

United States
Court of Appeals
for the Ninth Circuit

DISTILLERS DISTRIBUTING CORPORA-
TION, Appellee.

Transcript of Record

Appeal from the United States District Court for the
Northern District of California,
Southern Division

FILED

MAY 14 1957

PAUL P. O'BRIEN, CLERK

No. 15480

United States
Court of Appeals
for the Ninth Circuit

J. C. MILLETT CO., a corporation doing business
as Key Distributing Co., Appellant,

vs.

DISTILLERS DISTRIBUTING CORPORA-
TION, Appellee.

Transcript of Record

Appeal from the United States District Court for the
Northern District of California,
Southern Division

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	PAGE
Amendment to Complaint to Conform to Proof	30
Answer to Complaint.....	13
Answers to Interrogatories—See Interrogatories	27, 28
Appeal:	
Certificates of Clerk to Transcript of Record on	48, 49
Designation of Record on (Appellee's—USCA)	158
Notice of	44
Statement of Points and Designation of Record on (Appellant's—DC).....	45
Certificates of Clerk to Transcript of Record	48, 49
Complaint	3
Designation of Record (Appellee's—USCA) ..	158
Designation of Record (Appellant's—DC)....	46
Findings of Fact and Conclusions of Law.....	38
Interrogatories Propounded to Defendant (Partial)	28

ii.

Interrogatories Propounded to Plaintiff (Partial)	27
Judgment	43
Motions of Defendant to Dismiss.....	33
Names and Addresses of Attorneys.....	1
Notice of Appeal.....	44
Objections of Plaintiff to Proposed Findings of Fact, Conclusions of Law and Judgment	35
Statement of Points and Designation of Record on Appeal (Appellant's—DC).....	45
Transcript of Proceedings and Testimony, Jan. 16, 1957	50
Witnesses:	
Lewis, Franklin	
—direct	110
Lind, Frederick J.	
—direct	106
Transcript of Proceedings of Jan. 17, 1957....	141
Transcript of Proceedings of Jan. 25, 1957— Settlement of Findings, Entry of Judgment	153

NAMES AND ADDRESSES OF ATTORNEYS

J. ALBERT HUTCHINSON,
55 New Montgomery Street,
San Francisco, California,

LEON A. BLUM,
703 Market Street,
San Francisco, California,
Attorneys for Appellant.

PHILIP S. EHRLICH,
2002 Russ Building,
San Francisco, California,
Attorney for Appellee.

In the Superior Court of the State of California in
and for the City and County of San Francisco

No. 441111

J. C. MILLETT CO., a corporation, doing business
as KEY DISTRIBUTING CO., Plaintiff,

vs.

CALVERT DISTILLERS CORPORATION;
CALVERT DISTILLING CO.; CARSTAIRS
BROS. DISTILLING CO., INC.; WHITE
COMPANY, a fictitious corporation, and
BLACK CO., a fictitious partnership,
Defendants.

COMPLAINT FOR DAMAGES FOR BREACH
OF CONTRACT

Plaintiff complains of defendants and for a First
Cause of Action alleges:

I.

Plaintiff J. C. Millett Co. is a corporation organized and existing under the laws of the State of California. At all times herein mentioned plaintiff has been and still is the licensee and holder of licenses lawfully issued permitting plaintiff to engage in the importation and wholesale distribution of alcoholic beverages within the State of California.

II.

At all times herein mentioned plaintiff did, and

still does, own and operate the Key Distributing Co. as a division of the J. C. Millett Co. in the City of Oakland, County of Alameda, State of California. Heretofore plaintiff filed with the County Clerk of the said County a certificate of doing business under the fictitious name of Key Distributing Co. in compliance with the provisions of section 2466 of the Civil Code of this State, and published such certificate in the manner and for the time specified in section 2468 of the Civil Code of this State.

III.

At all times herein mentioned plaintiff did, and still does, own and operate the Monterey County Liquor Co. in Salinas, California.

IV.

Plaintiff is informed and believes and upon that ground alleges that the Calvert Distillers Corporation, named as one of the defendants herein, is a corporation duly organized and existing, and that the said corporation has been domesticated and authorized to do business in the State of California, and is therefore subject to the process of this Court. Plaintiff is likewise informed and believes that the Calvert Distilling Co. and the Carstairs Bros. Distilling Co. Inc. are and each of them is a corporation duly organized and existing. Plaintiff does not know the true name of the defendants sued as White Company, a fictitious corporation, or the Black Co., a fictitious partnership, and will ask leave to insert the same herein when ascertained.

V.

Plaintiff is informed and believes and upon that ground alleges that the defendants hereinabove named have been, and still are engaged in the manufacture, importation, exportation and sale of alcoholic beverages and within the State of California have so engaged, and are licensed to engage, under a distilled spirits importer's license as the same is defined in the Alcoholic Beverage Control Act (Statutes of 1935, page 1123, as amended; Business and Professional Code, Division 9) and by virtue of such license are lawfully authorized to exercise the privileges thereof and no others within the said State; that defendants are not authorized by said license to enter into, or conduct, or participate in, any transaction respecting alcoholic beverages and, more particularly, a sale thereof as defined in said Act with persons licensed to sell alcoholic beverages at retail to unlicensed persons, or with unlicensed persons.

VI.

Plaintiff is informed and believes and upon such ground alleges that at all times herein mentioned, and pursuant to the license hereinabove specified, the defendants were engaged in the importation and sale within the State of California certain distilled spirit products including but not limited to products bearing the labels and designation of "Lord Calvert", "Calvert Reserve", "Calvert Distilled London Dry Gin" and "Carstairs White Seal"; that all said products are prepared and

sold in containers bearing labels and sold under trade-marks and known by the trade names owned and controlled by the defendants, and are not available from any other source; and that the said products have been advertised and established in the minds of the purchasing public and have customer acceptance for that reason.

VII.

At all times herein mentioned the defendants have sold and distributed their said products within the State of California thru wholesale licensees designated or appointed by the said defendants as their respective distributors within a particular geographical area thereof, and have limited and restricted the sale of their said products to such wholesale licensees so designated or appointed. At all times herein mentioned the defendants have employed salesmen, sometimes known as "specialty men", and directed and required said salesmen to call upon the customers of its said distributors in purported support of the sale of defendants' products by such distributors to such customers; that the said salesmen have at such times solicited orders and sales, as defined in said Act, for defendants' products of and to persons other than those licensed in this State as wholesalers, manufacturers and rectifiers, and have submitted the orders so solicited and obtained to defendants' said distributors in such area for delivery thereof.

VIII.

For about ten years prior to March 1, 1952, plain-

tiff J. C. Millett Co. and its affiliates Key Distributing Co. and Monterey County Liquor Co. were engaged in the wholesale distribution of defendants' said products within several counties in the northern section of the State of California pursuant to an oral agreement then existing between plaintiff and defendants. Prior to March 1, 1952, defendants purported to repudiate said oral agreement and assert the right to unilaterally terminate the same without plaintiff's consent and without lawful cause. Plaintiff and its Affiliates refused to accede to such purported repudiation of the said agreement and asserted that the defendants were without right to unilaterally terminate the same without lawful cause. Thereafter, and prior to March 1, 1952, plaintiff and defendants entered into negotiations for the resolution of their respective rights and duties under the said agreement. Thereafter plaintiff and defendants agreed to the resolution of their respective rights and duties under said agreement by, and in consideration of the execution of a certain written agreement hereinafter referred to as the "written agreement", dated March 14th, 1952, copy whereof is annexed hereto marked "Exhibit 1" and incorporated herein by this reference as fully as if the same were set out verbatim and at length herein;

IX.

One of the conditions of the said written agreement was that the defendants agreed to promote the sale of its products by continuing to employ

salesmen sometimes known as "specialty men" within the counties of Alameda and Contra Costa in the manner and for the purpose specified in the preceding paragraph VII hereof, and submit the orders so solicited and obtained within the said two counties to the Key Distributing Co. for delivery. On and after March 14th 1952, when the said written agreement was executed between the parties hereto, the defendants did continue to employ such salesmen, and said salesmen continued to solicit and obtain orders in purported support of the sales of defendants' products, but failed, neglected and refused to submit all such orders to the Key Distributing Co. for delivery, but submitted a substantial portion thereof to other competing wholesale distributors of defendants in the said two counties for delivery.

X.

By reason of the facts hereinabove stated and particularly by reason of the failure, neglect and refusal by defendants to submit to the Key Distributing Co. orders solicited and obtained by the salesmen of defendants within the Counties of Alameda and Contra Costa for delivery according to the terms of said implied conditions of said agreement, the plaintiff has been damaged in an amount estimated at \$25,000.00.

For a second, further and separate cause of action against the same defendants plaintiff complains and alleges:

I.

Plaintiff repeats and re-alleges each and all the allegations contained in paragraphs I, II, III, IV, V, VI, VII and VIII of the preceding First Cause of Action hereof as respective allegations in this, the Second Cause of Action hereof, as fully as if set out in full herein.

II.

On December 15, 1952, while the said agreement dated March 14th 1952 was still in full force and effect, and pursuant to and in accordance with the terms thereof, the Key Distributing Co. executed and delivered to the defendants a written purchase order requesting shipment of nine hundred (900) cases of various sizes of the products of the defendants. Copy of said purchase order is attached hereto marked "Exhibit 2" and incorporated herein by this reference.

III.

The defendants failed, neglected and refused to ship and deliver to the Key Distributing Co. the said nine hundred (900) cases of products or any portion thereof without lawful reason therefor, and by reason of such failure, neglect and refusal on the part of the defendants, plaintiff has been damaged in an amount estimated at \$25,000.00.

For a Third, further and separate cause of action against the same defendants, plaintiff complains and alleges:

I.

Plaintiff repeats and re-alleges each and all the

allegations contained in paragraphs I, II, III, IV, V, VI, VII and VIII of the preceding First Cause of Action hereof as respective allegations in this, the Third Cause of Action hereof, as fully as if set out in full herein.

II.

In accordance with the terms and conditions of said written agreement of March 14, 1952 the Key Distributing Co. has at all times during the period commencing March 1st 1952 and ending December 31, 1952 used its best efforts to promote the sale of defendants' said products, maintained a sales force and selling and storage facilities therefor and an inventory of defendants' products sufficient to meet the demand therefor in said counties of Alameda and Contra Costa, devoted at least 23% of its time, sales effort and advertising expenditures in said counties toward the sale of defendants' said products therein, and purchased under and upon the terms and conditions of said agreement all of the defendants' said products it was able to resell in said counties at the prices determined by defendants therefor from time to time, and the said Key Distributing Co. at all said times duly and in good faith performed all the terms and conditions of the said agreement of distributorship on its part to be performed.

III.

The written agreement between the parties hereto dated March 14, 1952 and hereinabove referred to included a provision therein reading as follows:

11. This contract shall be effective for a period of ten months, from March 1, 1952. If distributor desires to renew the contract, he shall so notify Calvert not less than 30 days before December 31st 1952.

The foregoing provisions of the said agreement was intended by the parties thereto to mean, and was interpreted by the plaintiff to mean that in the event the said agreement was then in full force and effect and the Key Distributing Co. desired to renew and extend the said agreement, it had the sole and exclusive option to so extend and renew the same upon giving defendants not less than 30 days' notice of such intention prior to December 31, 1952.

IV.

On November 18, 1952, and while the said agreement was still in full force and effect, the Key Distributing Co. elected to renew the said contract, and pursuant to the provisions of par. 11 thereof which is fully set out hereinabove, the said Key Distributing Co. gave notice to the defendants of its election to exercise the said option and to renew the said agreement commencing with its expiration date on December 31, 1952. Copy of the said notice is attached hereto marked "Exhibit 3" and incorporated herein by this reference as fully as if set out in full herein.

V.

Thereafter, and on January 26, 1953, the defendants thru their attorney Frederick J. Lind advised plaintiff wrongfully, and without the fault of, or

default by, the Key Distributing Co. in the performance of said agreement, that the said agreement was terminated and ended as of December 31, 1952, and would not be renewed or extended notwithstanding the previous notice given by the Key Distributing Co. to the defendants notifying the defendants that the said Key Distributing Co. had elected to renew the said agreement in accordance with the terms thereof; and ever since then the defendants have failed, neglected and refused to give to and confer upon the Key Distributing Co. any of the benefits and privileges included in said agreement although the said Key Distributing Co. has at all times been ready, willing and able and has offered to perform in good faith all covenants and agreements on its part to be kept and performed under the terms of the said agreement and the requested renewal thereof.

VI.

By reason of the breach on the part of the defendants of the terms and conditions of the said agreement including the provisions of par. 11 thereof, plaintiff has been damaged in an amount estimated at \$100,000.00.

Therefore plaintiff prays for judgment against the defendants in the sum of \$25,000.00 upon the First Cause of Action hereof, in the further sum of \$25,000.00 upon the Second Cause of Action hereof, and in the sum of \$100,000.00 upon the Third Cause of Action hereof; for such other and further relief as in law or equity the facts may

require and the court may deem proper; and for costs and disbursements incurred in this action.

J. ALBERT HUTCHINSON and
LEON A. BLUM,
By J. ALBERT HUTCHINSON.

Duly Verified.

[Endorsed]: Filed August 25, 1954.

In the United States District Court, Northern
District of California, Southern Division

Civil Action No. 34034

J. C. MILLETT CO., a corporation, doing business
as KEY DISTRIBUTING CO., Plaintiff,

vs.

DISTILLERS DISTRIBUTING CORPORA-
TION, et al., Defendants.

ANSWER OF DEFENDANT DISTILLERS
DISTRIBUTING CORPORATION

Comes now defendant ("Defendant", as used herein, refers to Distillers Distributing Corporation, successor by merger to Calvert Distillers Corporation, and includes the latter), Distillers Distributing Corporation, substituted as a defendant herein in the place of Calvert Distillers Corporation, pursuant to stipulation of the parties and order of court, and severing from its co-defendants answers plaintiff's complaint as follows:

Answer to First Alleged Cause of Action

I.

Defendant admits the allegations of paragraphs I, II, and III of plaintiff's first alleged cause of action.

II.

Defendant admits the allegations of paragraph IV of plaintiff's first alleged cause of action insofar as they relate to this defendant.

III.

Defendant denies each and all of the allegations of paragraph V of plaintiff's first alleged cause of action insofar as they relate to this defendant, except defendant admits that it has been and still is engaged in the importation, exportation and sale of alcoholic beverages and within the State of California has so engaged and is licensed to so engage; and admits that its licenses in California do not authorize it to sell alcoholic beverages to persons licensed to sell alcoholic beverages at retail or to unlicensed persons.

IV.

Defendant denies each and all of the allegations of paragraph VI of plaintiff's first alleged cause of action insofar as they relate to this defendant, except defendant admits that at all times mentioned in plaintiff's complaint it was engaged in the importation and sale within the State of California of certain distilled spirit products including but not limited to products bearing the labels and designation of "Lord Calvert", "Calvert Reserve",

“Calvert Distilled London Dry Gin” and “Carstairs White Seal”.

V.

Answering paragraph VII of plaintiff's first alleged cause of action, defendant admits that at all times mentioned in plaintiff's complaint it has sold and distributed its products within the State of California through wholesale licensees designated or appointed by defendant as its respective distributors within a particular geographical area thereof, and has limited and restricted the sale of its products to such wholesale licensees so designated or appointed; admits that at all times mentioned in plaintiff's complaint it has employed salesmen, sometimes known as “specialty men”; defendant denies that it has directed and required said salesmen to call upon the customers of its distributors in purported support of the sale of its products by such distributors to such customers.

Further answering said paragraph VII, defendant denies each and all of the allegations therein contained, not hereinabove expressly admitted or specifically denied insofar as said allegations relate to this defendant.

VI.

Defendant denies each and all of the allegations of paragraph VIII of plaintiff's first alleged cause of action insofar as they relate to this defendant, except defendant admits that for about ten years prior to March 1, 1952, plaintiff J. C. Millett Co. and its affiliates, Key Distributing Co. and Monterey County Liquor Co., were engaged in the whole-

sale distribution of defendant's products within several counties in the northern section of the State of California.

VII.

Defendant denies each and all of the allegations of paragraph IX of plaintiff's first alleged cause of action insofar as they relate to this defendant.

VIII.

Defendant denies each and all of the allegations of paragraph X of plaintiff's first alleged cause of action insofar as they relate to this defendant; defendant denies that plaintiff has been damaged in the amount stated in said paragraph X, or in any sum, or otherwise or at all.

IX.

Except as hereinabove expressly admitted or denied, defendant denies each and all of the allegations of plaintiff's first alleged cause of action insofar as they relate to this defendant.

Defenses to First Alleged Cause of Action

I.

For a first, separate and distinct defense to plaintiff's first alleged cause of action, defendant says that the facts alleged in said first alleged cause of action are insufficient to state a claim upon which relief can be granted.

II.

For a second, separate and distinct defense to plaintiff's first alleged cause of action, defendant

alleges that if, as alleged in paragraph IX of plaintiff's first alleged cause of action, one of the conditions of the written agreement between the parties, dated March 14, 1952, was that this defendant agreed to promote the sale of its products by continuing to employ salesmen within the counties of Alameda and Contra Costa in the manner and for the purpose specified in paragraph VII of plaintiff's first alleged cause of action and submit the orders so solicited and obtained within the said two counties to Key Distributing Co. for delivery, said condition was and still is illegal, null and void, because it is and was at all times mentioned in plaintiff's complaint unlawful for the defendant under the licenses which it holds in the State of California to solicit or obtain orders for alcoholic beverages from persons licensed by the State of California to sell alcoholic beverages at retail and/or from unlicensed persons (Business and Professions Code of the State of California, secs. 23000 et seq.); that plaintiff at all times mentioned in plaintiff's complaint knew that it was unlawful for the defendant, within the State of California, to solicit or obtain orders for alcoholic beverages from persons licensed by the State of California to sell alcoholic beverages at retail and/or from unlicensed persons.

Answer to Second Alleged Cause of Action

I.

Answering paragraph I of plaintiff's second alleged cause of action, defendant repeats, realleges and makes a part hereof each and every admission,

denial, averment and allegation contained in paragraphs I, II, III, IV, V and VI of its answer to plaintiff's first alleged cause of action with the same force and effect as if repeated at length in this paragraph.

II.

Defendant admits the allegations of paragraph II of plaintiff's second alleged cause of action insofar as they relate to this defendant.

III.

Defendant denies each and all of the allegations of paragraph III of plaintiff's second alleged cause of action insofar as they relate to this defendant, except defendant admits that it did not ship and deliver to the Key Distributing Co. the said nine hundred cases of products or any portion thereof; defendant denies that plaintiff has been damaged in the amount stated in said paragraph III, or in any sum, or otherwise or at all.

IV.

Except as hereinabove expressly admitted or specifically denied, defendant denies each and all of the allegations of plaintiff's second alleged cause of action insofar as they relate to this defendant.

Defenses to Second Alleged Cause of Action

I.

For a first, separate and distinct defense to plaintiff's second alleged cause of action, defendant says that the facts alleged in said second alleged cause

of action are insufficient to state a claim upon which relief can be granted.

II.

For a second, separate and distinct defense to plaintiff's second alleged cause of action, defendant alleges that paragraph 5 of the agreement between the parties, dated March 14, 1952, Exhibit 1 to plaintiff's complaint, provided:

"5. Calvert agrees to supply its products to Distributor to the best of Calvert's ability, but it is understood and agreed that all or some products may not always be available to fill all orders and Calvert shall have the right to allocate to Distributor such proportion of the available supplies of its products as Calvert shall decide in its sole discretion. Calvert reserves the right not to ship any orders received where such orders would result in an inventory in the hands of Distributor greater than a 45-day inventory, based on the rate of sales of Calvert products by Distributor for the six months prior to the date of this contract.";

that defendant did not ship and deliver to Key Distributing Co. the merchandise listed in the written purchase order executed and delivered to defendant by Key Distributing Co. on December 15, 1952, because said order would have resulted in an inventory of defendant's products in the hands of Key Distributing Co. greater than a 45-day inventory, based on the rate of sales of defendant's products by Key Distributing Co. for the six

months prior to the date of the agreement between the parties, dated March 14, 1952.

III.

For a third, separate and distinct defense to plaintiff's second alleged cause of action, defendant alleges that the agreement between the parties, dated March 14, 1952, Exhibit 1 to plaintiff's complaint, terminated by its terms on December 31, 1952, and that said agreement was not renewed; that paragraph 12 of said agreement provided:

“12. In the event that this contract is not renewed, Distributor agrees that within 30 days after December 31, 1952, it will return to Calvert at its invoice price all of the Calvert merchandise remaining in its inventory.”;

that the merchandise listed in the written purchase order executed and delivered to defendant by Key Distributing Co. on December 15, 1952, if shipped by defendant, would have arrived at the premises of Key Distributing Co. on or about the date the said agreement between the parties terminated; that it would have been an idle act for defendant to ship and deliver to Key Distributing Co. the merchandise specified in said written purchase order because, under the terms of paragraph 12 of the said agreement between the parties, Key Distributing Co. would have been obligated to return said merchandise to the defendant at its invoice price.

IV.

For a fourth separate and distinct defense to

plaintiff's second alleged cause of action, defendant alleges that, if as alleged in paragraph IX of plaintiff's first alleged cause of action, one of the conditions of the written agreement between the parties dated March 14, 1952, was that this defendant agreed to promote the sale of its products by continuing to employ salesmen within the counties of Alameda and Contra Costa in the manner and for the purpose specified in paragraph VII of plaintiff's first alleged cause of action and submit the orders so solicited to Key Distributing Co. for delivery, defendant avers that said written agreement was at all times mentioned in plaintiff's second alleged cause of action and still is illegal, null and void because it is and at all times mentioned in plaintiff's complaint was unlawful for the defendant under the licenses which it holds in the State of California to solicit or obtain orders for alcoholic beverages from persons licensed by the State of California to sell alcoholic beverages at retail and/or from unlicensed persons; that plaintiff at all times mentioned in plaintiff's complaint, knew that it was unlawful for the defendant, within the State of California, to solicit or obtain orders for alcoholic beverages from persons licensed by the State of California to sell alcoholic beverages at retail and/or unlicensed persons.

V.

For a fifth separate and partial defense to plaintiff's second alleged cause of action and in mitigation of any damages to which the plaintiff may be,

or may appear to be, entitled to by reason of the alleged acts of defendant, as set forth in plaintiff's second alleged cause of action herein, defendant alleges that on February 19, 1953, Key Distributing Co. returned to defendant and received credit from defendant for seven hundred and forty-eight (748) cases and two hundred and six (206) bottles of defendant's products.

Answer to Third Alleged Cause of Action

I.

Answering paragraph I of plaintiff's third alleged cause of action, defendant repeats, realleges and makes a part hereof each and every admission, denial, averment and allegations contained in paragraphs I, II, III, IV, V, and VI of its answer to the plaintiff's first alleged cause of action with the same force and effect as if repeated at length in this paragraph.

II.

Answering paragraph II of plaintiff's third alleged cause of action, defendant denies it has any knowledge of information sufficient to form a belief as to the truth of any of the allegations contained in said paragraph II.

III.

Answering paragraph III of plaintiff's third alleged cause of action, defendant admits that the written agreement between the parties, dated March 14, 1952, included the provision set forth in said paragraph III; defendant denies that said provi-

sion was intended by the parties to mean that in the event the said agreement was then in full force and effect and the Key Distributing Co. desired to renew and extend the said agreement, it had the sole and exclusive option to so extend and renew the same upon giving defendant not less than thirty (30) days' notice of such intention prior to December 31, 1952; defendant admits that the said provision was interpreted by plaintiff to mean that in the event the said agreement was then in full force and effect and the Key Distributing Co. desired to renew and extend the said agreement, it had the sole and exclusive option to so extend and renew the same upon giving defendant not less than thirty (30) days' notice of such intention prior to December 31, 1952; defendant avers that it did not and does not agree with said interpretation; that said provision did not confer upon plaintiff the right to renew the said agreement; and that said agreement has not been renewed by defendant.

IV.

Answering paragraph IV of plaintiff's third alleged cause of action, defendant denies each and all of the allegations of said paragraph, except defendant admits it received the letter attached to the complaint as "Exhibit 3" while the agreement of March 14, 1952 was still in full force and effect; defendant denies that under the terms and provisions of the agreement between the parties, dated March 14, 1952, plaintiff had the right to elect to renew said agreement; defendant denies that under

the terms and provisions of said agreement plaintiff had the right to renew said agreement.

V.

Answering paragraph V of plaintiff's third alleged cause of action, commencing with the word "thereafter", on page 7, line 14, to and including the word "thereof", on page 7, line 21, defendant denies each and every allegation therein contained; defendant admits that it has not renewed the agreement between the parties, dated March 14, 1952; defendant denies it has any knowledge or information sufficient to form a belief as to the truth of the allegation "the said Key Distributing Co. has at all times been ready, willing and able and has offered to perform in good faith all covenants and agreements on its part to be kept and performed under the terms of the said agreement and the requested renewal thereof".

VI.

Defendant denies each and all of the allegations of paragraph VI of plaintiff's third cause of action; defendant denies that plaintiff has been damaged in the amount stated in said paragraph VI, or in any sum, or otherwise, or at all.

VII.

Except as hereinabove expressly admitted or specifically denied, defendant denies each and all of the allegations of plaintiff's third alleged cause of action insofar as they relate to this defendant.

Defenses to Third Alleged Cause of Action

I.

For a first, separate and distinct defense to plaintiff's third alleged cause of action, defendant says that the facts alleged in said third alleged cause of action are insufficient to state a claim upon which relief can be granted.

II.

For a second, separate and distinct defense to plaintiff's third alleged cause of action, defendant alleges that the written agreement between the parties, dated March 14, 1952, Exhibit 1 to the complaint, included a provision reading as follows:

"11. This contract shall be effective for a period of ten months, from March 1, 1952. If distributor desires to renew the contract, he shall so notify Calvert not less than 30 days before December 31st, 1952";

that said provision was intended by the parties to mean that in the event the agreement was then in full force and effect and the Key Distributing Co. desired to renew said agreement, it was to apply for said renewal by giving notice to defendant of its desire to renew not less than thirty (30) days prior to December 31, 1952, and that thereafter the defendant had the right to accept or reject said application for renewal; that said provision did not confer and was not intended by the parties to confer upon plaintiff the right to renew said agreement; that said agreement has not been renewed

by defendant; that said agreement terminated on December 31, 1952.

III.

For a third separate and distinct defense to plaintiff's third alleged cause of action defendant alleges that if as alleged in paragraph IX of plaintiff's first alleged cause of action one of the conditions of the written agreement between the parties dated March 14, 1952, was that this defendant agreed to promote the sale of its products by continuing to employ salesmen within the counties of Alameda and Contra Costa in the manner and for the purpose specified in paragraph VII of plaintiff's first alleged cause of action and submit the orders so solicited to Key Distributing Co. for delivery, defendant avers that said written agreement was at all times mentioned in plaintiff's third alleged cause of action and still is illegal, null and void because it is and at all times mentioned in plaintiff's complaint was unlawful for the defendant under the licenses which it holds in the State of California to solicit or obtain orders for alcoholic beverages from persons licensed by the State of California to sell alcoholic beverages at retail and/or from unlicensed persons; that plaintiff at all times mentioned in plaintiff's complaint knew that it was unlawful for the defendant, within the State of California, to solicit or obtain orders for alcoholic beverages from persons licensed by the State of California to sell alcoholic beverages at retail and/or from unlicensed persons.

Wherefore, defendant prays judgment that plaintiff take nothing by its complaint on file herein, and that defendant have and recover its costs of suit herein incurred.

PHILIP S. EHRLICH,
ALBERT A. AXELROD,
IRVING ROVENS,

Attorneys for Defendant, Distillers
Distributing Corporation.

[Endorsed]: Filed May 19, 1955.

[Title of District Court and Cause.]

INTERROGATORIES PROPOUNDED TO
PLAINTIFF BY DEFENDANT DISTILL-
ERS DISTRIBUTING CORPORATION

* * * * *

Interrogatory 4.

List the inventory of Calvert products that plaintiff had on hand on December 15, 1952, December 31, 1952 and January 31, 1953.

[See Answer at pages 94-95.]

* * * * *

[Endorsed]: Filed June 10, 1955.

[Title of District Court and Cause.]

INTERROGATORIES PROPOUNDED TO DEFENDANT

* * * * *

14. State the names and business or residence addresses of each officer, agent and employee of defendant, and any successor in interest, Calvert Distilling Co., hereinafter called Calvert, and Carstairs Bros. Distilling Co., Inc., hereinafter called Carstairs, designated and authorized to call upon persons licensed to engage in the purchase and resale to unlicensed persons of alcoholic beverages, hereinafter called retailers, within the Counties of Alameda and Contra Costa, State of California, for the period of January 1, 1952, to date, for the purpose of advertising, promoting, selling, soliciting orders or negotiating sales of products of each of said corporations, in this interrogatory referred to, to such persons so licensed in said counties.

[See Answer at pages 104-105.]

15. State the directions, policy and practice of each of said corporations referred to in interrogatory 14 with regard to the solicitation, negotiation or initiation by officers, agents and employees of such corporations of sales, orders for the purchase and proposals to purchase of retailers of products of such corporations in said counties for the period of January 1, 1952, to date and, if any be evidenced by any writing, the location and identity of the custodians of such writing or writings.

[See Answer at page 105.]

* * * * *

19. Identify and give the designation for each type or kind of report such sales representatives of each of said corporations referred to in interrogatory 14 make, and have made, to distributors indicating a proposal to purchase, or offer or willingness to buy, products of said corporations by or on behalf of a retailer, and identify each such report referring to the same made or delivered, during the period of January 1, 1952, to date, to (a) plaintiff and (b) other distributors or other persons named in interrogatory 18 hereof; and state the location of such reports and identify, by name, position and address, the present custodian of each such report.

[See Answer at page 105.]

* * * * *

21. State:

(a) the facts on which defendant relies in the asserted first special defense to plaintiff's second cause of action as justifying defendant's failure to deliver merchandise listed in the order dated December 15, 1952, and particularly that portion reading:

"because said order would have resulted in an inventory of defendant's products in the hands of Key Distributing Co. greater than a 45-day inventory, based on the rate of sales of defendant's products by Key Distributing Co. for the six months prior to the date of the agreement between the parties, dated March 14, 1952."

(b) the inventories respecting the six months

prior to December 15, 1952, referred to on which defendant relies, and identifying therein quantities of each product identified in the order referred to;

[See Answers at page 100.]

* * * * *

[Endorsed]: Filed April 5, 1956.

[Title of District Court and Cause.]

AMENDMENT TO COMPLAINT TO CONFORM TO PROOF

First Cause of Action

VII.

At all times herein mentioned the defendants have sold and distributed their said products within the State of California thru wholesale licensees designated or appointed by the said defendants as their respective distributors within a particular geographical area thereof, and have limited and restricted the sale of their said products to such wholesale licensees as designated or appointed. At all times herein mentioned the defendants have employed employees, sometimes designated as "specialty men", and directed and required its said specialty men to call upon the customers of its said distributors for the purpose of promoting the sales of its products and advertising its products to such customers and to aid said distributors in selling the defendants' products to such customers.

VIII.

For about ten years prior to March 1, 1952, plain-

tiff J. C. Millett Co. and its affiliates Key Distributing Co. and Monterey County Liquor Co. were engaged in the wholesale distribution of defendants' said products within several counties in the northern section of the State of California pursuant to an oral agreement then existing between plaintiff and defendants. Prior to March 1, 1952, defendants purported to repudiate said oral agreement and to assert the right to unilaterally terminate the same without plaintiff's consent and without lawful cause. Plaintiff and its said affiliates refused to accede to such purported repudiation of the said agreement and asserted that the defendants were without right to unilaterally terminate the same without lawful cause. Thereafter, and prior to March 1, 1952, plaintiff and defendants entered into negotiations for the resolution of their respective rights and duties under their said agreement. Thereafter plaintiff and defendants agreed to the resolution of their respective rights and duties under said oral agreement by, and in consideration of the execution of a certain written agreement hereinafter referred to as the "written agreement", dated March 14, 1952, copy whereof is annexed hereto marked "Exhibit 1" and incorporated herein by this reference as fully as if the same were set out verbatim and at length herein.

IX.

One of the provisions of the said written agreement, in paragraph 6 thereof, specified as follows:

"Calvert agrees to promote the sales of its

products and to advertise its products in a manner consistent with the type of merchandise and the cases sold * * *"

Said provision was intended to, and did operate for the joint benefit of plaintiff and defendants in this, that it enabled plaintiff to make a substantial number of sales of defendants' products to plaintiff's customers. Pursuant to the said provision defendants did maintain such specialty men to promote sales and advertise its products in the counties of Alameda and Contra Costa wherein the said written agreement was operative, for the joint benefit of plaintiff and defendants, until on or about July 1, 1952. On said last named date, while the said written agreement was still in full force and effect, and without cause *of* provocation on the part of plaintiff, the defendants ceased and discontinued said promotion and advertising of its products for the joint benefit of plaintiff and defendants, but continued such promotion and advertising for the benefit of defendants and plaintiff's business competitors in said area, at the exclusion of plaintiff and in express violation of the terms of the said written agreement.

X.

By reason of the facts hereinabove stated, and particularly by reason of the fact that on or about July 1, 1952 and for the remainder of the term of the said written agreement the defendants ceased and failed to continue its said promotion of sales and advertising for the joint benefit of plaintiff

and defendants and excluded plaintiff from the benefits to be derived therefrom, the plaintiff has been damaged in an amount estimated at \$25,000.00.

Dated: January 17, 1957.

J. ALBERT HUTCHINSON and
LEON A. BLUM,
/s/ By LEON A. BLUM,
Attorneys for Plaintiff.

[Endorsed]: Filed January 17, 1957.

[Title of District Court and Cause.]

MOTIONS TO DISMISS

Defendant in the above-entitled action moves the Court as follows:

1. To dismiss the complaint and each cause of action thereof upon the ground that the contract sued upon is illegal, null and void inasmuch as it contains a provision requiring defendant to perform an obligation which violates the Constitution of the State of California, the Alcoholic Beverage Control Act of the State of California and the public policy of the State of California.

2. To dismiss the first cause of action of plaintiff's complaint upon the ground that it fails to state a claim upon which relief can be granted because evidence of an alleged undertaking by defendant to promote the sale of its products in plaintiff's territory by continuing to employ salesmen therein for the purpose of soliciting orders

and submitting them to the plaintiff for delivery is not admissible. To admit such evidence would violate paragraph 16 of the contract which provides:

“This agreement represents the entire agreement between the parties and cannot be modified except in writing duly executed by both parties,”

and the parol evidence rule which has been codified in California in sections 1638 and 1639 of the Civil Code and section 1856 of the Code of Civil Procedure.

3. To dismiss the third cause of action of plaintiff's complaint upon the ground that it fails to state a claim upon which relief can be granted because paragraph 11 of the contract sued upon is unambiguous and gave plaintiff no right to renew or option to renew the contract.

4. To dismiss the complaint and each cause of action thereof under the provisions of Rule 41(b) of the Federal Rules of Civil Procedure on the ground that upon the facts and the law the plaintiff has shown no right to relief.

Dated: January 17, 1957.

PHILIP S. EHRLICH,
ALBERT A. AXELROD,
IRVING ROVENS,

Attorneys for Defendant Distillers
Distributing Corporation.

[Endorsed]: Filed January 17, 1957.

[Title of District Court and Cause.]

PLAINTIFF'S OBJECTIONS TO PROPOSED
FINDINGS OF FACT, CONCLUSIONS OF
LAW AND JUDGMENT

Plaintiff objects to proposed Findings of Fact and Conclusions of Law and Judgment proposed by defendant, and served upon plaintiff on the 21st day of January, 1957, as to both form and substance, in the particulars and upon the grounds following, namely:

I.

The proposals, individually and collectively, are neither (1) responsive to, nor (2) supported by, the record in this cause;

II.

The proposals are, and each of them is, contrary to the evidence received and the admissions of defendant herein;

III.

The proposals are, and each of them is, contrary to law;

IV.

The proposed findings are contrary to the evidence received and the admissions of defendant in the cause, in general and collectively, and in the following particulars, to wit:

1. Proposed findings, paragraph IV, relating to paragraph IX of the first cause of action, in that, First, the contract imposes upon defendant the obligation of promoting Calvert and Carstairs prod-

ucts in plaintiff's behalf and it is proved that such promotional support was affirmatively withdrawn by defendant in relation to plaintiff's rights and functions under the contract, and, Secondly, plaintiff regularly and timely moved for leave of Court to amend its complaint in this particular to conform to the proof received by the Court upon this subject matter, which motion is hereby expressly renewed and made anew upon the grounds and for the reasons heretofore stated and appearing in the record herein;

2. Proposed findings, paragraphs VIII and IX, relating to the second cause of action, in that, First, there is no pleading and no evidence of any so-called "lawful reasons for not shipping" the merchandise timely and duly ordered "pursuant to and in accordance with the terms" of the contract as alleged in paragraph II of the second cause of action and expressly admitted in paragraph II of defendant's answer to plaintiff's second cause of action; Secondly, the facts averred in paragraph II of defendant's second and separate defense to plaintiff's second cause of action are (1) contrary to the evidence and to the admissions of defendant and (2) insufficient in fact and law to constitute any defense to plaintiff's second cause of action, or any excuse for failure to perform paragraph 5 of the contract; and, Thirdly, the only purported evidence received in relation to this subject matter, in the form of plaintiff's answers to defendant's interrogatory numbered IV fails to indicate (1) that plaintiff's order was rejected, or rejected by

reason of paragraph 5 of the contract or by reason of plaintiff's inventory, or at all, or (2) that defendant's failure to deliver the ordered merchandise was based upon, or occasioned by, plaintiff's supposed inventory, or that existing inventories were balanced for purposes of resale in the usual course of plaintiff's business, or any of the same;

3. Proposed findings, paragraph XI, relating to the third cause of action, in that, First, it is admitted by defendant in paragraph III of its answer to the third cause of action that paragraph 11 of the contract interpreted by plaintiff as conferring upon it an option to renew the contract; and, Secondly, the purported findings is without evidentiary support other than said admission and the contractual document itself and the purported finding thereon is merely an erroneous conclusion of law upon the admitted facts;

4. Proposed findings, paragraph XII, relating to damages, is, First, contrary to the evidence and controlling substantive presumptions of law, and, Secondly, contrary to the stipulations of the parties and the rulings of the Court that damages shall be assumed and reserved for all purposes of decision upon the issues and questions related to defendant's liability as submitted to the Court for ruling and decision;

V.

The proposed conclusions of law and proposed judgment are, First, contrary to issues, admissions of defendant and the evidence received in the cause; Secondly, contrary to law in that none of the same

respond, conform or apply to the record in the cause; and, Thirdly, contrary to, and fail to apply, to the record in the cause, the controlling statutes, common law principles and rules of decision of the State of California, upon the questions of substantive law invoked by the pleadings and the evidence, as provided by law, as expressly stipulated in paragraph 15 of the contract between the parties in issue, or otherwise.

Wherefore, plaintiff respectfully requests that (1) each of the proposed findings hereinbefore particularly identified, namely: Numbers IV, VII, IX, XI and XII, and, (2) the proposed conclusions and the proposed judgment be stricken from the record and that the Court make and enter its findings, conclusions and judgment in accordance with the pleadings and evidence and in conformity to the substantive law of the State of California.

Respectfully submitted January 24, 1957.

J. ALBERT HUTCHINSON,
LEON A. BLUM,
/s/ By J. ALBERT HUTCHINSON,
Attorneys for Plaintiff.

[Endorsed]: Filed January 30, 1957.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause came on regularly for trial on the 16th and 17th days of January, 1957,

before the Court sitting without a jury, J. Albert Hutchinson, Esq., and Leon A. Blum, Esq., appearing as counsel for the plaintiff, and Philip S. Ehrlich, Esq., and Irving Rovens, Esq., appearing as counsel for defendant, and the Court having heard the testimony and having examined the proofs offered by the respective parties, and the cause having been submitted to the Court for decision, and the Court being fully advised in the premises now makes its findings of fact as follows:

Findings of Fact

I.

That it is true that after the commencement of this action the present defendant, Distillers Distributing Corporation, was substituted as a defendant herein in the place of Calvert Distillers Corporation.

II.

That it is true that this action involves a controversy which is wholly between citizens of different states and that the matter in controversy exceeds the sum of \$3,000 exclusive of interest and costs.

III.

That it is true that on March 14, 1952, plaintiff and Calvert Distillers Corporation entered into a written agreement which is attached as "Exhibit 1" to plaintiff's complaint.

IV.

That the allegations contained in paragraph IX of the first cause of action of plaintiff's complaint are, and each of them is, untrue.

V.

That the allegations contained in paragraph II of defendant's second, separate and distinct defense to plaintiff's first cause of action are, and each of them is, true.

VI.

That it is true that on December 15, 1952, plaintiff executed and delivered to Calvert Distillers Corporation a written purchase order requesting shipment of 900 cases of various sizes of the products of Calvert Distillers Corporation.

VII.

That it is true that Calvert Distillers Corporation did not ship and deliver to the plaintiff the 900 cases of products ordered by plaintiff on December 15, 1952.

VIII.

That it is untrue that Calvert Distillers Corporation did not have a lawful reason for not shipping to plaintiff the products requested in its order dated December 15, 1952.

IX.

That the allegations contained in paragraph II of defendant's second, separate and distinct defense to plaintiff's second alleged cause of action are, and each of them is, true.

X.

That it is true that paragraph 11 of the contract between Calvert Distillers Corporation and plaintiff dated March 14, 1952, provided:

"This contract shall be effective for a period

of ten months, from March 1, 1952. If distributor desires to renew the contract, he shall so notify Calvert not less than 30 days before December 31, 1952."

XI.

It is untrue that the provisions of paragraph 11 of the contract between Calvert Distillers Corporation and plaintiff dated March 14, 1952, were intended by the parties to mean that in the event the said agreement was then in full force and effect and Key Distributing Co. desired to renew the said agreement, it had the sole and exclusive option to so extend and renew the same upon giving Calvert Distillers Corporation not less than 30 days' notice of such intention prior to December 31, 1952.

XII.

That it is not true that plaintiff has been damaged in the sums alleged in plaintiff's complaint, or in any other sums, by reason of any acts or conduct on the part of Calvert Distillers Corporation and/or of its agents, servants or employees.

From the foregoing facts, the Court concludes as follows:

Conclusions of Law

I.

The contract made and entered into by Calvert Distillers Corporation and plaintiff on March 14, 1952, and attached to plaintiff's complaint as "Exhibit 1" was not breached by Calvert Distillers Corporation in any respect.

II.

The contract between Calvert Distillers Corporation and plaintiff dated March 14, 1952, terminated by its terms on December 31, 1952.

III.

The provisions of paragraph 11 of the contract between Calvert Distillers Corporation and plaintiff dated March 14, 1952, did not give plaintiff an option to renew said contract.

IV.

The contract pleaded in plaintiff's complaint and relied upon by plaintiff in this action was and is illegal, null and void.

V.

Plaintiff is entitled to take nothing by reason of its complaint against defendant and that defendant have judgment for its costs of suit herein incurred.

Let Judgment be entered accordingly.

Dated: January 31st, 1957.

/s/ MICHAEL J. ROCHE,

Judge of the United States District
Court.

Acknowledgment of Service Attached.

[Endorsed]: Filed January 31, 1957.

In the United States District Court, Northern
District of California, Southern Division

Civil Action No. 34034

J. C. MILLETT CO., a corporation, doing business
as KEY DISTRIBUTING CO., Plaintiff,

vs.

DISTILLERS DISTRIBUTING CORPORA-
TION, et al., Defendants.

JUDGMENT

The above-entitled cause came on regularly for trial on the 16th and 17th days of January, 1957, before the Court sitting without a jury, J. Albert Hutchinson, Esq., and Leon A. Blum, Esq., appearing as counsel for the plaintiff, and Philip S. Ehrlich, Esq., and Irving Rovens, Esq., appearing as counsel for defendant, Distillers Distributing Corporation, and was duly submitted for consideration and decision, and the Court after due deliberation rendered its decision and on the 31st day of January, 1957, made and filed its findings of fact, conclusions of law and order for judgment.

Now, Therefore, pursuant thereto, It Is Ordered and Adjudged that plaintiff take nothing by its action and that defendant have judgment for its costs and disbursements herein expended, to be hereinafter taxed, on notice, and hereinafter inserted by the Clerk of this Court in the sum of \$.....

Done in open Court this 31st day of January, 1957.

/s/ MICHAEL J. ROCHE,
Judge of the United States District
Court.

Entered in Civil Docket January 31, 1957.

[Endorsed]: Filed January 31, 1957.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the Clerk of the Above-Entitled Court:

To the Defendant Above Named and to Messrs.
Philip S. Ehrlich and Irving Rovens, its Attorneys:

You and Each of You Will Please Take Notice that plaintiff intends to, and it does hereby, appeal to the United States Court of Appeals for the Ninth Circuit, from that certain judgment and those certain findings of fact and conclusions of law in the above-entitled proceeding, in favor of defendant and against plaintiff, and made and entered in the above-entitled Court the 31st day of January, 1957, and from each and the whole thereof.

Dated this 6th day of February, 1957.

LEON A. BLUM and
J. ALBERT HUTCHINSON,
/s/ By J. ALBERT HUTCHINSON,
Attorneys for Plaintiff.

[Endorsed]: Filed February 7, 1957.

[Title of District Court and Cause.]

APPELLANT'S STATEMENT OF POINTS
AND DESIGNATION OF RECORD

To the Clerk of the Above-Entitled Court:

Pursuant to Rule 17, Rules of Practice of the United States Court of Appeals for the Ninth Circuit, appellant respectfully submits herewith its statement of points on which appellant intends to rely in the above-captioned appeal and upon its designation of the portions of the record material to the consideration of the appeal.

Statement of Points to Be Relied Upon

Points upon which appellant intends to rely may be concisely stated as follows:

1. The evidence in the cause is insufficient to justify the findings and judgment, particularly including, but not limited to the findings numbered IV, VIII, IX, XI, and XII.

2. The judgment and findings are contrary to the evidence, particularly including, but not limited to, the findings numbered IV, VIII, IX, XI and XII.

3. The judgment and each of the conclusions of law numbered I, II, III, IV and V are contrary to law and outside the issues presented by the pleadings of the parties to the cause.

4. The appellant was prevented from having a fair trial, and was materially prejudiced by the failure of the trial court to sustain appellant's objections to the proposed findings of fact and conclusions of law proposed by appellee.

5. The appellant was prevented from having a fair trial, and was materially prejudiced by the sustaining of appellee's objections to appellant's motion to amend its complaint to conform to the proof in the cause and by the denial of leave to file such amended complaint.

6. The appellant was prevented from having a fair trial, and was materially prejudiced by the excluding of appellant's interrogatories to appellee and appellee's answers thereto, excluding the same as evidence in the cause.

7. The appellant was prevented from having a fair trial, and was materially prejudiced by the sustaining of appellee's objections to testimony relating to the interpretation of the contract set forth in the complaint, excluding the same as evidence in the cause.

Designation of Material Portions to the Record on Appeal

Appellant hereby designates the material portions of the record on appeal on which appellant intends to rely, namely:

1. Appellant's complaint, pages 1 through 8, excluding jurat;

2. Appellee's answer to appellant's complaint, pages 1 through 12;

3. Appellant's amendment to complaint to conform to the proof, pages 1 through 3;

4. Appellee's motion to dismiss, filed January 17, 1957;

5. Appellant's objections to findings of fact and conclusions of law *in* judgment proposed by appellee;

6. Notice of appeal;

7. Judgment;

8. Appellant's designation of record on appeal;

9. Interrogatories propounded by appellant to appellee, numbered XIV, XV and XIX.

10. Answers of appellee to appellant's interrogatories, numbered XIV, XV and XIX, in part, as quoted in reporter's typewritten transcript, pages 68 and 69;

11. Documentary evidence received and offered and rejected, identified as plaintiff's exhibits I, II, III and IV;

12. Reporter's transcript of oral proceedings, as follows:

a. Page 3, Line 1 through Page 11, Line 9;

b. Page 23, Line 16 through Page 24, Line 14;

c. Page 33, Line 23 through Page 35, Line 12;

d. Page 39, Line 6, through Page 40, Line 2;

e. Page 41, Line 14 through Page 118, Line 9;

f. Page 124, Line 4 through Page 126, Line 11;

g. Page 134, Line 12 through Page 144, Line 12.

Respectfully submitted,

LEON A. BLUM and

J. ALBERT HUTCHINSON,

/s/ By J. ALBERT HUTCHINSON,

Attorneys for Appellant.

Acknowledgment of Service Attached.

[Endorsed]: Filed March 19, 1957.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD
ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, hereby certify the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this Court in the above-entitled case and constitute the record on appeal herein as designated by the attorneys for the appellant:

Excerpt from Docket Entries.

Transcript on Removal from Superior Court of San Francisco.

Answer of Distillers Distributing Corporation.

Interrogatories by Defendant to Plaintiff.

Answer of Plaintiff to Interrogatories.

Interrogatories by Plaintiff to Defendant.

Answer of Defendant to Interrogatories.

Amendment to Complaint to Conform to Proof.

Motion of Defendant to Dismiss.

Findings of Fact and Conclusions of Law.

Objections of Plaintiff to Proposed Findings and Conclusions.

Judgment.

Notice of Appeal.

Appeal Bond.

Appellant's Designation of Record on Appeal.

Reporter's transcript of proceedings January 16, 17 and 25, 1957.

Plaintiff's Exhibits 1, 2, 3 and 4.

Defendant's Exhibits A and B.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 9th day of March, 1957.

[Seal] C. W. CALBREATH,
Clerk,

/s/ By MARGARET P. BLAIR,
Deputy Clerk.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO SUPPLEMENTAL RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, hereby certify the foregoing and accompanying document, listed below, is the original filed in this Court in the above-entitled case and constitutes the supplemental record on appeal herein:

Appellant's Statement of Points and Designation of Record.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 1st day of April, 1957.

[Seal] C. W. CALBREATH,
Clerk,

/s/ By MARGARET P. BLAIR,
Deputy Clerk.

In the United States District Court, Northern
District of California, Southern Division

No. 34,034

J. C. MILLETT CO., a corporation, doing business
as KEY DISTRIBUTING CO., Plaintiff,

vs.

DISTILLERS DISTRIBUTING CORPORA-
TION, et al., Defendants.

TRANSCRIPT OF PROCEEDINGS

January 16, 1957

Before: Hon. Michael J. Roche, Judge.

Appearances: For the Plaintiff: J. Albert Hutchinson, Esq., Leon A. Blum, Esq. For the Defendants: Philip S. Ehrlich, Esq., Irving Rovens, Esq. [1]*

The Clerk: J. C. Millett vs. Distillers Distributing Corporation, on trial. Counsel, state your appearances for the record.

Mr. Hutchinson: I am J. Albert Hutchinson, and associated with me is Leon A. Blum, attorneys for the plaintiff.

Mr. Ehrlich: I am Philip S. Ehrlich, and associated with me is Irving Rovens, counsel for the defendants.

The Court: Now, the first thing, we are supposed

* Page numbers appearing at top of page of original Reporter's Transcript of Record.

to have a pretrial in all things. I think you gentlemen are aware of that, aren't you? There are six categories here and I will call the roll on them. Is there any prospect of a settlement in this case?

Mr. Hutchinson: I believe not.

Mr. Ehrlich: No, your Honor.

The Court: Any amendment to the pleadings?

Mr. Hutchinson: We don't propose any for the plaintiff, your Honor.

Mr. Ehrlich: None for the defendant.

The Court: Is there any reference here to a Master?

Mr. Hutchinson: I don't believe there is any need or service in that, your Honor.

Mr. Ehrlich: I agree.

The Court: Very well. Now, is there any limitation in relation to expert witnesses?

Mr. Hutchinson: I believe there will be only one expert [3] on the plaintiff's side.

Mr. Ehrlich: Possibly one or two on ours.

The Court: Now, the issues here, what are they, gentlemen?

Mr. Hutchinson: They have been substantially simplified by the pleadings and some further evidence by answers to interrogatories. The action is based on a contract and three alleged breaches of contract. The existence of the contract and most of the outstanding events that are alleged are, I do not believe, disputed. Damages, of course, are disputed and the interpretation of the contract is disputed.

The Court: A written contract, is it?

Mr. Hutchinson: Yes.

Mr. Ehrlich: Yes, your Honor, attached to the complaint.

The Court: Now, is there anything else?

Mr. Ehrlich: I think not, your Honor. I think at this time I should state in connection with a simplification of the issues, that it is our contention that this case should be decided on motions that I will make raising legal issues.

I am raising a question of illegality and voidance of the contract, and that goes as to the entire complaint and the three counts.

Then I raise the issue on the first count that the matters pleaded are a violation of the terms of the contract and a violation of parole evidence—the parole evidence rule, so [4] that as to the first count no testimony can be adduced, and that such count, therefore, does not state a claim for relief.

As to the third count, I raise the same issue, that the contract speaks for itself; that the allegations raising interpretation or surplusage and the conclusions of the pleader does not bind us, and that there is no exception pleaded which permits of parole evidence; and that it is a matter of construction of the contract which is a matter for the court to determine from the face of the contract, which is attached to the face of the contract. In due course I will make my motions.

Mr. Hutchinson: I might say, those matters, I believe, have been passed upon in the motion to dismiss except the claim of illegality, your Honor. That was ruled upon in this department.

The Court: I conclude, then, gentlemen, that the

only thing left to be done is to protect your record, both sides, so that in the event I make any mistakes here you can take advantage of them.

Mr. Ehrlich: Thank you, your Honor.

Mr. Hutchinson: If the Court please, for such assistance as it may be, I have prepared a trial memorandum in which I have attempted to outline the admissions and the denials, and there was a case that dealt with a somewhat similar background decided in this court. Since I had copies [5] of the opinion, I thought it might be helpful to the court.

The Court: Have you served the other side?

Mr. Hutchinson: Yes, I have just delivered copies to counsel, your Honor.

I think it might be helpful if I made a brief statement of the case.

The Court: Proceed.

Mr. Hutchinson: The plaintiff is engaged in the wholesale distribution of various products, principally alcoholic beverages, and engaged in business here, in the East Bay, and in the Monterey Bay area.

The defendant is the result of a merger of three national distributors of alcoholic beverages: Seagram's Distillers Corporation, Calvert Distillers Corporation, and Frankfort Distillers Corporation.

The dealings of the plaintiff were with the Calvert Distiller's Corporation, which is the exclusive national sales agent for products bearing the name Calvert and a series of brands referred to as Carstairs.

In California the defendant Calvert, the present defendants, are licensed as distilled spirits manufacturer's agents. In other words, under our California licensing system a manufacturer may not do business directly in California except under a manufacturer's agent's license, unless the manufacture of distilled spirits occurs in this state, [6] which is not true here. The distribution pattern with regard to distilled spirits manufactured out of the state, therefore, is to have them imported either directly to the wholesaler from outside the state or through the manufacturer's agent for the manufacturer. It is said in the pleadings and I think that would be the evidence, that Calvert and the present defendants do not manufacture but do distribute for companies bearing the same names as the products which they distributed.

Prior to the year 1951 the plaintiff in its three branches engaged in the distribution of Calvert's and Carstair's products, purchasing them from the distributing agent, Calvert, and reselling them to its customers, the retail licensees, who sell both in packages and for consumption on the premises.

In 1951 there was some discussion between the parties resulting ultimately in the execution of a written contract dated, as I recall, March 14, 1952. That contract is appended to the complaint and is admitted. I think there is no dispute of its existence and the accuracy of the document which is attached to the complaint. It is a printed form, prepared by Calvert in this case, and only the name of the distributor, the area involved, certain prices, and other

data of that kind peculiar to the particular distributor is set out in the contract.

One of the provisions of the contract is that Calvert [7] would promote its products.

The Court: Would what?

Mr. Hutchinson: Would promote and advertise its products. And the first cause of action in the complaint deals with an alleged failure to promote Calvert products in plaintiff's area.

I might say at this point that the written contract referred to and dealt only with the Alameda branch of plaintiff's business, which was operated under the business name of Key Distributing Company, and the contract contemplated service in Alameda and Contra Costa Counties.

Our evidence will show, we believe, that not only did Calvert not attempt to promote its products as provided in the contract in support of the plaintiff's distribution of its products, but that Calvert actually assisted others, competitors, to take away the plaintiff's business.

The second cause of action relates to a failure to deliver merchandise as ordered in December of 1952. It is admitted that the order was received, that it was not filled; and it is also admitted that the order was received while the contract was in full force and effect, and that it was filed or delivered in accordance with the contract. It would seem, therefore, that the only issue in that count is the question of damages.

The third cause of action has to do with the question of [8] a renewal of the existing contract.

Paragraphs 11 and 12 of the contract specifically deals with the renewal of that contract.

If I may, I would at this time read the pertinent paragraphs, your Honor.

Paragraph 11 of Exhibit A to the Complaint reads as follows:

“This contract shall be effective for a period of ten months from March 1, 1952. If distributor desires to renew the contract, he shall so notify Calvert not less than 30 days before December 31, 1952.”

Paragraph 12 has to do with what would happen if there were no renewal, and reads as follows:

“In the event that this contract is not renewed, distributor agrees within 30 days after December 31, 1952, it will return to Calvert at its invoice price all of the Calvert merchandise remaining in its inventory.”

When the Complaint was filed the defendant filed in response a motion to dismiss, and that was rather fully briefed on both sides and orally argued. The principal point on the last item here, the question of renewal, depended on the construction of that contract. The Court concluded here that the contract did provide for an option on the part of the distributor. [9]

It is admitted that an attempt to exercise that option was made, and we have attached to the Complaint a letter exercising that option and a letter in response to it which arrived in January of the following year, indicating that there was no renewal contemplated, and no further deliveries, including

the delivery on the order for 900 cases of December 15, 1952.

If the court adhered to that interpretation of the contract, it would seem that there is no issue except as to the amount of damages suffered by the plaintiff on that score.

If I may, I could identify the documentary evidence at this time, those items which are attached to the complaint, so that they might maintain the same numbers.

The Court: Do you wish to make a statement?

Mr. Ehrlich: Yes, I would like to make a statement before we introduce any evidence.

The Court: Very well.

Mr. Hutchinson: I think with that outline, your Honor, and the more detailed showing in our trial brief we might submit the matter for the purpose of the motion which counsel appears to have in mind.

Mr. Ehrlich: If your Honor please, I suggest that in connection with my opening statement, I will combine my opening statement and use it as an argument to support the motion which I would now like to make, and then argue the motions and at the same time consider that as my opening statement. [10]

I first want to make a motion to dismiss the Complaint, and each count of the Complaint, on the grounds that the contract alleged in the Complaint—not the Exhibit 1 which is the actual contract between the parties, but that the contract alleged in the Complaint is illegal and void, violates the Constitution of the State, the Alcohol Control Beverage

Act, and the public policy of the State of California.

Having made that motion, I will argue it in connection with my opening statement.

I direct that, your Honor please, to all three counts as well as the Complaint. So that we contend the court has nothing to do but dismiss on the basis we are here on an illegal contract, a contract against public policy.

All this appears from the allegations of the Complaint. And I say again, that is the contract alleged, not the contract which is attached.

With reference to the first count, if your Honor please, I desire to reiterate the motion as to illegality and voidness, and then to make the motion that no testimony is admissible to vary the terms of the written instrument. Your Honor did hear this at one time, but I feel that the count fails to state a claim for relief, and accordingly, under the law you could raise the failure of the Complaint to state a cause for relief for the first time in the United States Supreme Court.

I know your Honor will examine this in the light of a [11] fuller analysis and discussion of the law applicable to the count. We contend that the allegations which they have inserted in the Complaint and which taint the contract with illegality are inadmissible. There is no evidence to be admitted with respect thereto.

Now, that is as to the first count.

As to the second count, our defense is as follows: that they did not have the right to renew the con-

tract which terminated on a certain date. I will explain that fully to your Honor. The provisional contract says, "If you desire to renew". That is merely the expression of a wish. "If you wish to renew, notify us and we will let you know what we are going to do."

I will go into that fully in the argument.

So that we contend that the second count, when they ordered this merchandise, the time for delivery, the time it took to deliver the merchandise, it could not have arrived here before the termination of the contract under our construction of the contract. In addition to that, we will establish that the order violated the terms of the written contract attached to their complaint.

I will call to your Honor's attention the provisions of the contract which sets forth that at no time can the distributor, in this case the plaintiff, have more than 45 days' supply based on the previous six months' average. And we [12] will show by testimony that had we delivered this merchandise the distributor would have had in excess of a six months' supply. We will also call to your Honor's attention the fact that 708 cases—they ordered 900 cases. Under the contract they returned to us, when we did not recognize their effort to renew, some seven or eight hundred odd cases of merchandise.

We also, of course, direct your Honor's attention to the fact that our first motion goes as to the second count as well, the illegality and voidance.

Now, as to the third count, we again reiterate the

illegality and voidness, and in addition we move that the third count be dismissed on the ground that the contract speaks for itself, and that the only interpretation that the Court can make on that contract is that it terminated by reason of our refusal to join in with their desire to renew. Accordingly, the document speaks for itself. No testimony can be adduced. It is a matter of law for the court to determine. Accordingly, the third count on its face likewise fails to state a claim for relief.

Now, if your Honor please, directing my argument to the motion to dismiss the complaint on the grounds that it is illegal and void.

I first want to direct your Honor's attention in that connection to the allegations of the complaint, and in this [13] connection I call your Honor's attention to paragraph 5 of the Complaint.

May I again reiterate, your Honor, we have a contract here some 15 or 16 pages in length, which was a contract, we admit, that was executed and governed the parties. However, the plaintiff in his complaint and in this first count alleges as follows:

That the defendant, that is to say, the manufacturer distiller's agent, which is the House of Seagram, which is the seller in this case and which succeeded to the Calvert Distilling, which was the original party in agreement—they say here, and I read now from allegation 5:

“Plaintiff is informed and believes and upon that ground alleges that the defendants hereinabove named have been, and still are engaged in the manufacture, importation, exportation and sale of

alcoholic beverages and within the State of California have so engaged, and are licensed to engage, under a distilled spirits importer's license as the same is defined in the Alcoholic Beverage Control Act—”

which is the Act of the State of California controlling the manufacture, sale, distribution and delivery of intoxicating alcoholic beverages within the State of California—

“—and by virtue of such license are lawfully authorized to exercise the privileges thereof and no others [14] within the said state; that defendants are not authorized—” This is their pleading, page 2, line 31— “—are not authorized by said license to enter into, or conduct, or participate in, any transaction respecting alcoholic beverages and, more particularly, a sale thereof, as defined in said Act with persons licensed to sell alcoholic beverages to retail to unlicensed persons, or with unlicensed persons.”

And then they allege in paragraph 7, line 22:

“At all times herein mentioned the defendants have employed salesmen, sometimes known as ‘specialty men’, and directed and required said salesmen to call upon the customers of said distributors—” one of whom was the plaintiff in this action— “in purported support of the sale of defendants’ products by such distributors to such customers; that the said salesmen have at such times solicited—” that is to say, these specialty men, the defendants’ specialty men— “solicited orders and sales, as defined in said Act, for defendants’ products of and to per-

sons other than those licensed in this state as wholesalers, manufacturers and rectifiers, and have submitted the orders so solicited and obtained to defendants' said distributors in such area for delivery thereof."

Now, that's their pleading. That's what their specialty [15] men have done. They have violated the laws of the State of California.

I now, then, read from paragraph 9. This is the gravamen of this situation, your Honor. Not being satisfied with the written agreement, which is attached to the complaint and was the actual agreement of the parties, here is what they allege in paragraph 9—allegation 9:

"One of the conditions of the said written agreement was that the defendants agreed to promote the sale of its products by continuing to employ salesmen sometimes known as 'specialty men' within the counties of Alameda and Contra Costa in the manner and for the purpose specified in the preceding paragraph 7 hereof, and submit the orders so solicited and obtained within the said two counties to the Key Distributing Company for delivery—"

That is the division of the plaintiff which was doing business in Alameda and Contra Costa. In other words, they allege that our specialty men continued to solicit and obtain orders and turned them over to the distributor for delivery.

"On and after March 14, 1952, when the said written agreement was executed between the parties hereto, the defendants did continue to employ such

salesmen, and said salesmen continued to solicit and obtain orders in purported support of the sales of the defendants' products, but failed, neglected and refused to submit all [16] such orders to the Key Distributing Company for delivery, but submitted a substantial portion thereof to other competing wholesale distributors of defendants in the said two counties for delivery."

I direct your Honor's attention to this allegation, in which it is alleged that we indulged in this illegal practice.

Now, paragraph 9 of the complaint: "One of the conditions of said written agreement—" Listen to this, your Honor— "One of the conditions of said written agreement—" It isn't in the agreement, but it is pleaded here as one of the conditions. The word "condition", of course, is merely the plaintiff's conclusion. This is nothing more nor less than an additional obligation which is not contained in the written contract.

And by the way, if your Honor please, paragraph 16 of that written contract provides it cannot be varied or modified except by a written agreement between the parties.

Now, they allege here, "One of the conditions—" That is a condition which they have asserted and pulled out of the thin air and pleaded as a part of the agreement between the parties.

"One of the conditions of the said written agreement was that the defendants agreed to promote the sale of its products by continuing to employ salesmen sometimes known as 'specialty men' within the

counties * * * and [17] submit the orders so solicited.

“* * * On and after March 14, 1952, when the said written agreement was executed between the parties, the defendant did continue to employ such salesmen, and said salesmen continued to solicit and obtain orders—”

But refused and neglected, again I say to your Honor, to turn them over to the plaintiff but gave them to others.

Now, then, the last allegation of the first count:

“By reason of its acts hereinabove stated and particularly by reason of the failure, neglect and refusal by defendants to submit to the Key Distributing Company orders solicited and obtained by the salesmen of defendants within the counties of Alameda and Contra Costa for delivery according to the terms of said implied conditions of said agreement, the plaintiff has been damaged in an amount estimated at \$25,000.00.”

Now, I direct your Honor's attention in connection with my argument on this matter in the first place to the Constitution of the State of California, which provides in substance, Article 22—I will not read it to your Honor at this time, but merely resume it for your Honor—that the subject of the sale of intoxicating alcoholic beverages is a matter clearly within the domain of the Legislature to make such rules and regulations, and that the liquor industry—that the sale, distribution, manufacture and delivery of alcoholic [18] beverages cannot be engaged in in the state of California save and ex-

cept under the rules and regulations provided by the Legislature, and that it cannot be done other than by persons properly licensed to do so.

Now, I call your Honor's attention to the alcoholic Beverage Control Act, which is the Act passed by the Legislature governing the manufacture, sale and distribution of alcoholic beverages in the state of California. And I make this statement to your Honor, that this pleading here of this alleged implied condition is violative of the Constitution, the public policy of the State and statutory law.

Now, I read to your Honor from the Business and Professions Code, the Alcoholic Beverage Control Act, Section 23,001, where the Legislature of the State of California has pronounced the public policy. And I need not tell your Honor, that the sale, manufacture and distribution of alcoholic beverages has been from time immemorial a subject of the police powers of the State. It has been from time immemorial that this type of activity is, more than any other, subject to police power.

But we don't need to rely on the common law. The Legislature of the State of California has expressed its public policy in regard to this matter. I quote to your Honor Section 23,001 of the Alcoholic Beverage Control Act.

"This division—" talking about the Alcoholic Beverage Control Board— "This division is an exercise of the [19] police power of the State for the protection of the safety, welfare, health and morals of the people of the state, to eliminate the evils of unlicensed and unlawful manufacture, selling, and

disposing of alcoholic beverages, and to promote temperance in the use and consumption of alcoholic beverages. It is hereby declared that the subject matter of this division involves in the highest degree the economic, social, and moral well-being and the safety of the State and of all its people. All provisions of this division shall be liberally construed for the accomplishment of these purposes."

Now, there you have the declared policy of the people of the state of California.

Now, I want to read to your Honor next some quotes from the Alcoholic Beverage Control Act, a definition of the word "sell". I read from Section 23,025 of the Alcoholic Beverage Control Act. And I emphasize to your Honor that this implied condition, not contained in the written contract, comes exactly within the purview of the definition of the word "sell". I will then show to your Honor after I have established that, that what they have alleged here is contrary to public policy, contrary to law, because the defendant, as a manufacturer's agent, had no right to sell to retailers. He could only sell to wholesalers. And what we did was sell to retailers under the definition contained in the Alcoholic Beverage Control Act. [20] I read now the definition of the word "sell":

" 'Sell' or 'sale' and 'to sell' includes any transaction whereby, for any consideration, title to alcoholic beverages is transferred from one person to another, and includes the delivery of alcoholic beverages pursuant to an order placed for the purchase

of such beverages and soliciting or receiving an order for such beverages * * *”

They have alleged in this complaint that we, as manufacturer’s agent solicited and received orders but failed to turn them over to them, to the plaintiff, whereas we should have done so, but turned them over to other distributors. And they define in the Alcoholic Beverage Control Act the word “sell” as specifically including within that term soliciting and receiving an order.

I now read to your Honor the section for “Necessity of Life”:

“No person shall exercise the privilege or perform any act which a licensee may exercise or perform under the authority of a license unless the person is authorized to do so by a license issued pursuant to this division.”

We had no right to do this. I will call that to your Honor’s attention in the next provision of the Alcoholic Beverage Control Act. And then the section goes on to make [21] the violation of this Act a misdemeanor.

Now I read to your Honor Section 23,355:

“Except as otherwise provided in this division and subject to the provisions of Section 22 or Article XX of the Constitution, the licenses provided for in Article II of this chapter authorize the person to whom issued to exercise the rights and privileges specified in this Article and no others.”

In other words, the only right that we could exercise are the rights which the license gives and none

other. Our right was to sell to the wholesalers as a manufacturer's agent.

Now I direct your Honor's attention to Section 23,366 having to do with the rights of the distilled spirits manufacturers' agent license. That was the license that we had as a distilled spirits manufacturer's agent. I read from subdivision (d) thereof. It goes on to give us certain other privileges with which we are not concerned in this case. Subdivision (d) thereof reads as follows:

"Whether cut, blended, mixed, flavored, or colored by him, or any other person, the packaging and the sale or delivery of distilled spirits only to holders of distilled spirits manufacturer's, rectifier's or distilled spirits wholesaler's licenses."

Manufacturers isn't involved here. Rectifiers isn't [22] involved here. "Distilled spirits wholesaler's licenses".

In other words, we as manufacturer's agents could only sell to these three groups—the manufacturer, the rectifier, or distilled spirits licensee. And then it goes on to say the violation of this also constitutes a crime.

Now I direct your Honor's attention to the allegations of the complaint, which I have read to your Honor, which state that there was an implied condition of this contract, and this is the contract which is before your Honor and the contract on which they stand or fall. One of the conditions of that was that condition which they claim, and which, of course, we deny, as a matter of fact, but for the purpose of the suit here they are before

your Honor on a contract which violates the Constitution, public policy as I read, and the statutory law.

Now, I say to your Honor, I am not relying on my interpretation, although I feel that it is complete and sound. I feel unqualifiedly that there is no out from the allegations of their complaint. But I want to call to your Honor's attention, there was a case somewhat similar in which this counsel for the plaintiff acted as counsel for the plaintiff, a case in Los Angeles, and at that time—I have a copy of the transcript of that case, and I want to read to your Honor the statement that counsel for the plaintiff sitting here made with respect to this very matter and with respect to the [23] allegations which he has pleaded as an implied condition of the contract.

Mr. Hutchinson: Counsel, I don't think this plaintiff should be charged with counsel for some other plaintiff.

Mr. Ehrlich: Well, I want to show counsel's interpretation, if your Honor please, of this very provision of the contract, and I think it is a legitimate statement to be made in connection with an argument for your Honor.

The Court: Proceed.

Mr. Ehrlich: I read from the case of A.B.C. Distributing Corporation, plaintiff, vs. Distillers Distributing Corporation, in the Superior Court of the State of California, in and for the County of Los Angeles, No. 635,634, Reporter's Daily Transcript, Wednesday, May 23, 1956. I read from page

605. This is a statement made by Mr. Hutchinson as counsel:

“A competitor of the plaintiff—” that was a distributor, as this plaintiff here is a distributor—
“—as another distributor had the privilege to compete, but Calvert—” that was the original defendant here— “—had no privilege to compete for the customers of these retailers because they could not deal with them legally. The plaintiff’s customers were not among the class of licensees which the manufacturers, Calvert *and were* entitled to deal, and therefore, any effort to do so was unlawful.” [24]

And we have quoted our early instruction, that is, Code Section 1667, that that is not lawful, which is contrary to the express provision of law, contrary to the policy of express law, although not expressly prohibited or otherwise contrary to good morals.

That is a statement by counsel that the defendant in this case, the manufacturer’s agent, had no right to solicit or receive or sell and turn over orders to retailers—or to distributors, rather. He had no right to solicit the retailer, to receive an order from him, and turn it over to the distributor.

But we don’t have to go to Los Angeles. We only have to go to the case before your Honor here and to counsel’s opening brief, and I will prove from counsel’s opening brief that the implied condition which he is contending in his complaint he admits to be illegal.

This is a brief which he submitted in connection

with the motion to dismiss. At that time we had not raised this question of illegality as we are raising it today. I call to your Honor's attention the plaintiff's memorandum in opposition of the motion to dismiss and in reply to the defendant's statement of reasons and authorities.

I read from page 8 of this memorandum. Counsel states as follows:

"A. The First Cause of Action: Defendant's breach [25] of the contract in failing to promote the sale of its products through plaintiff, as its distributor, in accordance with the contract."

So he indicates there that this is not a condition but really an additional provision which he is now trying to insert in the written agreement.

He then goes on to allege:

"Plaintiff's first cause of action is addressed to defendant's breach of its undertaking to promote the sale of its products in plaintiff's territory by continuing——"

That is a quotation from the Complaint, the allegations which I have read to your Honor from Paragraphs V, VII, VIII and IX, which I have read to your Honor and which I will not repeat.

He aspirates these quotes from the allegations of his Complaint, and then he has this note. After citing these allegations from his Complaint, this implied condition,

"By express statutory proscription, defendant is prohibited from making sales or deliveries to licensed retailers and its promotional activities can only be carried out as 'in support' of its distribu-

tors, whose licenses alone permit sales to retail licensees."

And I read to your Honor from the Alcoholic Beverage Control Act the definition of the word "sell" which says, [26]

"Solicit and receive and turn over orders to other wholesalers for delivery."

So that he here in his own memorandum admits that the wholesaler could not—that the manufacturer's agent could not sell to the retailer, but fails to realize that the definition of "sale" includes the soliciting and receiving and turning over to the wholesaler the order that he solicited and received for delivery. So I say to your Honor that in this memorandum that counsel filed, he substantiates the position I am taking as to the illegality of the contract.

I also read to your Honor from page 10, so there can't be any question. I am reading from counsel's memorandum:

"It may not be disputed, therefore, that defendant expressly promised and agreed to promote the sale of its product through solicitation of orders for submission to plaintiff as its distributor."

Which, of course, comes clearly within the purview of the section which defines the word "sell," and then comes within the purview of the section which prohibits the manufacturer's agent, which is defendant in this case, from selling to anyone but a manufacturer, a rectifier or a wholesaler.

I could go on to read other provisions from the brief. The same holds true in page 12 of his brief

where he again reiterates the same solicitation, receiving and turning over, and that this was one of the contractual obligations of the [27] plaintiff.

I also direct your Honor's attention to this proposition of law, that Section 1,441 of the Code of Civil Procedure reads as follows—Excuse me, your Honor, I have it right here.

Well, I will find it in a minute, your Honor. Let's assume just for the purpose of argument, which I don't concede, but for the sake of argument that instead of it being a contractual obligation, and I contend it isn't anything else, this obligation of ours which he alleges as a condition, I say to your Honor that under the Code Section which covers condition the same holds true, because if the condition is illegal, the contract must be thrown out.

I direct your Honor's attention to Section 1441 of the Civil Code which provides:

“A condition in a contract the fulfillment of which is impossible or unlawful within the meaning of the Article on the objects of contract is void.”

So I say to your Honor, whether it is a condition or whether it is a provision of the contract which he is trying to insert into the written agreement, the condition is illegal and he is before your Honor on a contract which violates, again I say, the Constitution, public policy and statutory law.

I need not read to your Honor—I am sure your Honor [28] knows the provisions I have here of Cal. Juris. stating the effect of the illegality of a contract, that no relief can be given on the contract.

Now, that goes as to my motion on illegality and avoidance.

Directing your Honor's attention now to Count 1, while your Honor has ruled upon this at the time, I feel we are entitled to express our point of view to your Honor and to differ with the original ruling that your Honor made on the motion to dismiss, and have at this time a more thorough exposition of this matter, a greater opportunity to develop it, present our authorities to your Honor. I am satisfied, and the reason that I again present this to your Honor is because of the fundamental rule of law that if the complaint states no claim for relief it can be raised in the United States Supreme Court or any place at any time.

Now, I direct your attention that Count 1 contains this implied condition, but the contract is attached to the complaint and this contract contains the following provision. I read the last provision of the contract. I am reading from Paragraph XVI of the contract.

The Court: Pardon me just a minute. Where is that?

Mr. Ehrlich: Paragraph XVI, your Honor.

The Court: Very well, proceed.

Mr. Ehrlich: Your Honor will realize that under this provision the parties agreed that this agreement represented [29] the entire understanding, the entire agreement between the parties, and cannot be modified except in writing, duly executed by both parties. Now, here is a flagrant effort to violate the provisions of this agreement by inserting in the

contract another provision, because when we analyze it, what does he say? He says that the defendant here was obligated—this is a verbal understanding—we were obligated to solicit, receive orders, sell the merchandise, and then turn it over to the plaintiff for delivery, and to take care of the other details.

But this agreement here provides that it is the entire story, that nothing else can be added, it can't be changed, it can't be modified, it can't be varied.

But forget this provision 16, and assuming we didn't have a provision 16, we still have the parol evidence rule. The only way that this contract, assuming 16 wasn't in it—with 16 in it, it can't be modified except in the way the parties provide. But assume that wasn't in it, the parol evidence rule provides that you cannot vary or add or subtract from a written agreement unless you plead fraud, mistake, or there is some special reason why the parol evidence rule is not applicable.

So I say to your Honor that the condition—forgetting the illegality; I am finished with that argument—forgetting that and relying now on the terms of this written contract, [30] by virtue of Paragraph XVI and by virtue of the parol evidence rule your Honor must hold as a matter of law that this count does not state a cause of action.

We, of course, deny—I am not going into the merits, I am merely arguing these legal issues, because we deny that any such condition was ever entered into between the parties. So I say to your

Honor that as a matter of law the Complaint fails to state a claim for relief.

I will not argue the second count other than to again direct your Honor's attention to my argument on illegality, which applies to that.

Now, the third count, if your Honor please, we also again say to your Honor that on further analysis of the third count your Honor must determine that as a matter of law there is no claim for relief here.

This legal argument depends—it is a very simple situation—depends entirely on the construction of the provisions of the contract. And I direct your Honor's attention to Paragraph XI, which is the paragraph which we are discussing. Paragraph XI reads as follows:

“This contract shall be effective for a period of ten months from March 1, 1952. If distributor desires to renew the contract——”

Desires, that is the word.

“——desires to renew the contract, he shall so [31] notify Calvert not less than 30 days before December 31, 1952.”

And then it goes on to provide that if it isn't renewed, in Paragraph XII:

“In the event that this contract is not renewed, distributor agrees that within 30 days after December 31, 1952, it will return to Calvert at its invoice price all of the Calvert merchandise remaining in its inventory.”

I read that to your Honor so that your Honor

can understand that the parties had in contemplation that the contract might not be renewed.

Now, I say to your Honor that that provision of the contract is a matter of construction for the Court to determine. The plaintiff is asking you here to determine that this contract is what? It's a right, privilege or option. No words were used to that effect. It would have been very simple for the parties, if they wanted to give any party a right to renew, a permit to renew, an option to renew, they could have said very readily there, "The distributor has the right, the option and the privilege to renew."

They didn't say that. They didn't give him the right, privilege and option. They said, "If he desires to renew the contract, if they wish to renew it, notify Calvert. Calvert will let them know what they want to do."

And that is very understandable. This otherwise becomes [32] a perpetual contract, and your Honor knows that perpetual contracts are frowned at in law, and unless it is essential to contrive a contract as a perpetual contract it will not be so contrived.

But this is a provision to protect the House of Seagrams, as the present defendant is, so that they might know; if the distributor wanted to give the matter up, they wanted 30 days' notice so that they could get another distributor, or if they weren't satisfied, but they wanted to get the first reaction from the distributor if he wished to renew.

So again I say to your Honor, they are asking your Honor to strike out the word "desire" and

insert in lieu thereof "right, privilege, option," and this contract does not so provide.

So I say to your Honor that both by reason of the argument previously made, Section 16, no parol evidence can be adduced here, no evidence can be introduced by reason of Section 16, and the parol evidence rule prevents the introduction of any evidence. It is for your Honor to determine what was meant as a matter of law just from the face of this contract, whether the word "desire" can be construed to mean "option, right and privilege."

Concluding my argument and my opening statement and my motion in support of my motions, I would ask your Honor at this time to dismiss the complaint on the grounds which I have [33] mentioned, and all counts, on the ground of illegality and voidance for the reasons I have indicated to your Honor; and if your Honor doesn't see fit to do that, to dismiss Count 1 for the grounds that I have suggested to your Honor and Count 3 on the ground that I have suggested to your Honor.

Thank you.

Mr. Hutchinson: May it please the Court, we have a somewhat anomalous position, it seems to me, before us. Calvert prepared this contract in printed form, as stipulated in the exhibit here, in large numbers or it would not have been printed, and now stands before this Court and claims the contract was criminal.

Mr. Ehrlich: That is not correct, your Honor. Pardon me. Pardon the interruption. I made a

special statement that the contract attached to the complaint is legal, but the condition which they pleaded as a part of the contract is illegal.

The Court: He limited his argument on the pleadings, not the contract.

Mr. Hutchinson: The pleading is that, "thereafter plaintiff and defendant entered into the resolution of their respective rights and duties under said agreement by and in consideration of the execution of a certain written agreement, hereinafter referred to as "The written agreement," dated March 15, 1952, copy whereof is annexed hereto marked 'Exhibit [34] 1' and incorporated herein by this reference as fully as if the same were set out verbatim and at length herein.

"One of the conditions of the said written agreement was that the defendants agreed to promote the sale of its products by continuing to employ salesmen sometimes known as 'specialty men'."

The pleading refers to no agreement and no condition not within the written agreement just identified by reading from Paragraphs VIII and IX. We claim no agreement other or different than the one attached. If the agreement is not illegal, then there is certainly no argument on this question of illegality. [35]

* * * * *

Now, as to the third, the question of option, we both read Paragraph XI and I think the Court probably can recall it fully. It gives to one party only the right to elect whether to renew.

The Court: What was that statement? I didn't follow that.

Mr. Hutchinson: It gives to the distributor the right to determine whether he desired to renew. If he desired to renew, all he had to do was notify Calvert. The paragraph is very short:

"If the distributor desires to renew the contract, he shall so notify Calvert not less than 30 days before December 31, 1952."

In our memorandum on the motion to dismiss, which the Court has already considered, we cited not only the general authorities but, I think, something like 30 cases in which identically or comparably worded provisions were held to be options, and to give the option to the person who was to give the notice.

We cited cases from nearly every jurisdiction, and that [39] memorandum, commencing with page 30, lists a good dozen cases where that precisely was held. [40]

* * * * *

However, the 1953 contract, when they made the new contract with the distributor in 1953 and later, their printed form read differently, and reads the way they tried to express this clause in their answer. They didn't say what they say here, that the distributor, if he desires to renew, shall give notice. It says if he desires to renew he shall apply for a renewal. And in one of the cases counsel referred to in quoting one of the plaintiff's counsel, the Court decided that the "applied for" meant—

The Court: Suppose there was a refusal. Where would we find ourselves then?

Mr. Hutchinson: That is what we have here, your Honor, [41] and the substantive law on that is quite clear. Our California Supreme Court in *Brodel vs. Warner Brothers*—or perhaps it was *Warner Brothers vs. Brodel*. I will find that for you in a moment, your Honor. They specifically announce the rule which provides—I am reading from page 26 and 27 of the memorandum on the motion to dismiss. I am quoting from the court, 31 Cal. 2d 766, 773; 192 Pac. 2d 949, *Warner Brothers Pictures vs. Brodel*.

“The creation of the final contract requires no promise or other action by the optionor, for the contract is completed by the acceptance of irrevocable offer of the optionor by the optionee. The contract has already been made, as far as the optionor is concerned, but is subject to conditions which are removed by the acceptance. Thus the option contract gives the optionee a right against the optionor for performance of the contract to which the option relates upon the exercise of the option, which the optionor cannot defeat by repudiating the option.”

Then there are cases cited and the quotation continues:

“Since the optionor promises to perform the contract to which the option relates, subject to a condition at the discretion of the optionee, an option contract involves on the part of the optionor a unilateral promise to perform the obligations of the contract to which the [42] option relates.”

In other words, this contract by the simple exercise of the option provided for in Paragraph XI and the giving of notice within the time required merely continues the exact contract for the extended period. And that is all any option does. There are millions of such options.

The Court: Extended period? What do you mean?

Mr. Hutchinson: The new period. The same period as the old period. That is what happens in leases.

The Court: That is the reason I queried. It goes on for another year, let us say.

Mr. Hutchinson: Yes.

The Court: Under your position the contract would go on indefinitely.

Mr. Hutchinson: The cases on that point are not as clear as they are on the other points, your Honor. I might say that if it were an issue, it would be resolved in favor of the plaintiff's position, if it was necessary to take the position that you had a right to renew annually. In the Coca-Cola cases decided in the——

The Court: (Interposing) You are taking me by surprise, I want to tell you frankly, on that phase of this litigation. That would be a continuing contract forevermore under your reasoning.

Mr. Hutchinson: Not necessarily. [43]

The Court: I say that so that you will be advised.

Mr. Hutchinson: Not necessarily. However, the cases have held in the instance of leases where op-

tions, of course, are most common, that the renewal provision is not itself renewed. That is, all the contract is renewed except the renewal provision, so that in each case, unless it is spelled out differently, the option in effect functions once, and the theory apparently is that an option is merely an irrevocable offer. When you make an offer and you accept it, then you have a contract and, unless you make another offer, there is not another.

The Court: May I offer a suggestion here?

Mr. Hutchinson: Yes, your Honor.

The Court: Keeping in mind the story of this matter, when was it first filed?

Mr. Hutchinson: My recollection is it was 1954.

Mr. Erhlich: It was filed August 25, 1954, your Honor.

The Court: I suggest this, and both sides are protected: For the purpose of the record I will deny the motion at this time without prejudice and we will proceed to marshal the facts in this case. I anticipate no difficulty finally, gentlemen, unless I am taken by surprise. I am not too familiar with what is ahead of me. If that is agreeable——

Mr. Hutchinson: That is quite agreeable to us, your Honor. [44]

The Court: Now, let me offer another suggestion: Aren't there some stipulations you might enter into here in relation to the proof that can't be challenged?

I am going to take a recess and you can get together. You may agree. If you do agree on some

matters, let it be read into the record. Is that agreeable?

Mr. Hutchinson: Yes, your Honor.

The Court: All right, we will be at recess.

(Short recess.)

Mr. Hutchinson: If your Honor please, I believe we are able to follow up the suggestion of the court to some extent, and at this time I will offer in evidence a carbon copy of a contract signed by both parties, which is appended in photographic form to the complaint, as plaintiff's exhibit first in order.

Mr. Ehrlich: No objection.

The Court: Let it be admitted and marked next in order.

(Contract referred to admitted into evidence as Plaintiff's Exhibit 1.)

Mr. Hutchinson: We then offer as Plaintiff's Exhibit 2 a carbon copy of a purchase order No. 07094, dated December 15, 1952, copy of which is appended to the complaint.

Mr. Ehrlich: No objection.

The Court: Let it be admitted and marked.

(Purchase Order No. 07094 admitted into evidence as [45] Plaintiff's Exhibit 2.)

Mr. Hutchinson: We now offer in evidence carbon copy bearing the signature of J. C. Millett of a letter addressed to Calvert Distillers Corporation and dated November 18, 1952, which is also attached to the complaint.

Mr. Ehrlich: Defendant received the original. No objection.

The Court: Let it be admitted and marked.

(Letter referred to admitted into evidence as Plaintiff's Exhibit 3.)

Mr. Hutchinson: We now offer as Plaintiff's Exhibit next in order a letter on the letterhead of Frederick J. Lind, an attorney of New York City, Chrysler Building, dated January 26, 1953, and addressed to Leon A. Blum, Esq., San Francisco.

I believe it will be stipulated, will it not, gentlemen, that Mr. Lind wrote the letter for Calvert?

Mr. Ehrlich: Representative of Calvert. We so stipulate.

The Court: Let it be admitted and marked.

(Letter referred to admitted into evidence as Plaintiff's Exhibit 4.)

Mr. Hutchinson: Now, with regard to the complaint, it occurred to us that we could briefly summarize the things which are admitted, and we have some stipulations as we [46] progress which could be identified for the record.

The Court: Identify it for the purpose of the record.

Mr. Hutchinson: The allegations of Paragraph I of the plaintiff's Complaint, which briefly recites the name and nature of the business and the license status of the plaintiff, are admitted.

Mr. Ehrlich: Admitted.

Mr. Hutchinson: Paragraph II is also admitted. It briefly identifies the divisional operation of the plaintiff and makes reference to Key Distributing, which is the East Bay operating agent.

Mr. Ehrlich: Allegation 2 admitted.

Mr. Hutchinson: Paragraph III relates to the

Monterey branch, Monterey County Liquor Company, which is admitted.

IV is admitted as to the present defendant, but not as to Calvert.

Mr. Ehrlich: We might clean that up, too, Mr. Hutchinson. As the result of your mentioning in your opening statement the corporate reorganization, the only defendant before this court now is the House of Seagrams.

Mr. Hutchinson: Yes.

The Court: Let the record so show.

Mr. Hutchinson: And Paragraph IV, then, would be true as to the House of Seagrams, and, as to the dates when Calvert operated independently, true as to Calvert Distillery. [47]

Mr. Ehrlich: It isn't in the litigation at the present time, nor is Carstairs. The only defendant before the court is the House of Seagrams.

Mr. Hutchinson: Yes.

Paragraph V, which deals briefly with the statutes that apply, is admitted in the following respects:

Plaintiff recites he is informed and believes, and this is the allegation:

"Defendants still are engaged in the importation, exportation and sale of alcoholic beverages within the state of California, and so engaged and are licensed to engage under a distilled spirits importer's license as same as defined in the Alcoholic Beverage Control Act, as amended," giving the citation to the statute.

"That defendants are not authorized by said

license to enter into or conduct a sale as defined in said Act, to persons licensed to sell alcoholic beverages at retail to unlicensed persons, or with unlicensed persons.”

Paragraph VI is admitted in these respects only:

“The defendants were engaged in the importation and sale within the state of California of certain distilled spirits products, including but not limited to products bearing the label and designation of Lord Calvert, Calvert Reserve, Calvert Distilled London Dry Gin, and Carstairs White Seal.”

I believe we have an admission or, rather, a stipulation with regard to a denial of control of the trademarks, and if I may, I will attempt to state that stipulation.

The Calvert Distillers Corporation at the time involved in this action, and the defendant now, while not the owners of those trademarks, were the exclusive distributors throughout the United States of products bearing those trademarks.

Mr. Ehrlich: The first and last clauses of the contract set that forth, your Honor, so we stipulate. It reads as follows:

“Whereas, Calvert has the sole and exclusive right to distribute within the United States the alcoholic beverages produced by The Calvert Distilling Company, and Carstairs Brothers Distilling Company, Inc., and from time to time may have the exclusive right to sell other alcoholic beverages.”

The Court: So stipulated?

Mr. Ehrlich: Yes.

Mr. Hutchinson: Yes.

The Court: Very well.

Mr. Hutchinson: Parenthetically, I might say that is for the purpose of showing these products were not available from other sources.

Paragraph VII is admitted in part, and I will read the admitted portions: [49]

“At all times herein mentioned the defendants have sold and distributed said products within the state of California.”

Mr. Ehrlich: Make it “defendant.” We are now talking about the House of Seagrams for the stipulation purposes.

Mr. Hutchinson: All right. “This defendant has sold and distributed its said products in the state of California through wholesale licensees designated or appointed by the said defendant as its respective distributors within a particular geographical area thereof, and have limited and restricted the sale of its said products to such wholesale licensees so designated or appointed. At all times herein mentioned the defendant has employed salesmen, sometimes known as ‘specialty men’.”

That is all in Paragraph VII that is admitted.

In Paragraph VIII this portion is expressly admitted:

“For about ten years prior to March 1, 1952, plaintiff J. C. Millett Company and its affiliates Key Distributing Company and Monterey County Liquor Company, were engaged in the wholesale distribution of defendant’s said products within

several counties in the northern section of the state of California.”

Mr. Ehrlich: So admitted.

Mr. Hutchinson: The remainder of Paragraph VIII is [50] denied.

IX is denied. Paragraph X is denied. The latter relates to damages.

As to the second cause of action, both parties repleaded portions of the first cause of action and their defense, and they appear in Paragraph I and have already been adverted to that extent.

Paragraph II is admitted in full, and it reads as follows:

“On December 15, 1952, while the said agreement dated March 14, 1952, was still in full force and effect, and pursuant to and in accordance with the terms thereof, the Key Distributing Company executed and delivered to the defendant a written purchase order requesting shipment of 900 cases of various types of products of the defendant, copy of said purchase order is attached hereto marked Exhibit 2 and incorporated herein by this reference.”

That is all in Paragraph II.

Paragraph III of the same second cause of action is admitted in part in this regard.

“The defendant failed to ship and deliver to the Key Distributing Company——”

Mr. Ehrlich: No, we don't admit that. We say we did not ship and deliver, not that we failed, your Honor. Here is what we will stipulate, only that

it did not ship and deliver to Key Distributing Corporation 900 cases of any [51] products at all.

Mr. Hutchinson: That is, I think, acceptable. The remainder of the paragraph relates to damages, which is denied.

In the third cause of action the first paragraph is a repleading in both the case of the complaint and the answer.

The second paragraph is denied in toto on information and belief.

Paragraph III, portions are apparently admitted and I will read those:

"The written agreement between the parties hereto dated March 14, 1952, and hereinabove referred to included a provision therein reading as follows:

'11. This contract shall be effective for a period of ten months, from March 1, 1952. If distributor desires to renew the contract, he shall so notify Calvert not less than 30 days before December 31, 1952.' "

There are some partial admissions, but stated in their own language, portions of that which will be adverted to in reference to the answer.

Paragraph IV is admitted in this regard:

"On November 18, 1952, and while the said agreement was still in full force and effect, the Key Distributing Company——"

Mr. Ehrlich: No. [52]

Mr. Hutchinson: You will have to read it, I think.

Mr. Ehrlich: Defendant admits it received the

letter attached to the Complaint as Exhibit 3, while the agreement of March 15, 1952, was still in full force and effect.

Mr. Hutchinson: Thank you. I think that will suffice on that.

The fifth paragraph is denied in toto, but there is a separate admission as to the failure to renew which perhaps you would like to read.

Mr. Ehrlich: Yes. Defendant admits that it has not renewed the agreement between the parties dated March 14, 1952.

Mr. Hutchinson: The concluding paragraph of the third count is No. VI, which relates to damages and is denied in toto.

Now, I believe we can stipulate at least to a portion of certain other facts.

First, if witnesses were called, witnesses would testify that the contract's paragraph 11, which has been adverted to in argument and in the pleadings, was modified in the contracts newly written in 1953 to read as follows, this stipulation to be subject to any objection which counsel wishes to make to the evidence, but merely as a means of getting it before the court without calling witnesses.

Mr. Ehrlich: Will you read that statement again?

The Court: Read it, Mr. Reporter. [53]

(Statement read by the reporter.)

Mr. Ehrlich: You have left there the blank there?

Mr. Hutchinson: Yes, I was going to read that, but I wanted your objection to appear.

Mr. Ehrlich: We can't—

The Court: (Interposing) Pardon me. If there is any question about it, you had better not stipulate.

Mr. Ehrlich: We can't stipulate because I have 15 or 20 objections to the testimony.

Mr. Hutchinson: Now, has counsel been able to ascertain whether it is possible to stipulate that on December 15, 1952, there was in San Francisco or the East Bay supplies of its products described in the order dated December 15, 1952?

Mr. Ehrlich: No, we will not so stipulate.

The Court: Now, what about the original contract? Is it available?

Mr. Hutchinson: Yes, that has been introduced.

Mr. Ehrlich: That is the first exhibit.

Mr. Hutchinson: Would it be helpful to have that read to the court so that we may have before us the details?

The Court: You may, the pertinent parts of it.

(Thereupon the agreement, Plaintiff's Exhibit 1, was read into evidence by Mr. Hutchinson.)

Mr. Hutchinson: It is signed by Walter F. Terry for the Calvert Distillers Corporation, and by J. C. Millett for [54] the plaintiff. Attached thereto are the exhibits, which are Exhibit A, the Schedule of Prices, and the second is a list of other products, or perhaps all products then distributed by the plaintiff, for the purpose of the 90-day notice of any change.

Mr. Ehrlich: Mr. Hutchinson, at this time, be-

fore you put in your testimony, I would like you to admit certain documents, if you will. Here is the first one (handing document to counsel.)

Mr. Hutchinson: Counsel has exhibited a letter to Frederick J. Lind, sent by Leon A. Blum on behalf of the plaintiff. We can stipulate that that letter was dispatched on or about the date it bears.

The Court: It may be admitted as next in order.

(Letter referred to admitted into evidence as Defendant's Exhibit A.)

Mr. Hutchinson: Counsel has exhibited to us a letter dated February 24, 1953, addressed to Calvert Distillers at its San Francisco office by Key Distributing Corporation, through its comptroller, to which are appended an invoice and two carbon copies of the credit memo. Subject to the opportunity to show a mistake, if any should appear, we will stipulate that the letter with the three enclosures was dispatched at or about its date.

The Court: It may be admitted as next in order.

(Letter referred to admitted into evidence as Defendant's Exhibit B.)

Mr. Ehrlich: Mr. Hutchinson, we would like to introduce this, the answer to Question No. 4 in the interrogatories, showing the inventory on hand on those three dates.

Mr. Hutchinson: I see no objection to receipt of the answers to interrogatories.

Mr. Ehrlich: No.

Mr. Hutchinson: It occurred to me we might introduce all of the plaintiff's—

Mr. Ehrlich: (Interposing) No, I wouldn't stip-

ulate to that because we contend some of the interrogatories are subject to objection. That is why I specified this one, which goes to the proof of one of the provisions of the contract, one of our defenses, as to whether we had the right to refuse your order, and count two, based on the inventory on those dates.

Mr. Hutchinson: Well, this interrogatory was proposed and we will stipulate that this is the answer. We wouldn't wish to stipulate to any of the inferences that might flow from it.

Mr. Ehrlich: No. This just shows the inventory which you gentlemen had on hand those respective dates. The figures shown there are the figures of the inventory. The value of it is a matter for us to argue. [56]

Mr. Hutchinson: That is right.

Mr. Ehrlich: Could the reporter copy this?

The Court: You might read it.

Mr. Ehrlich: Well, it is a series of—May I show this to your Honor? It is a series of numbers. We will have the reporter copy the answer to Interrogatory No. 4.

Reporter's Note: Answer to Interrogatory No. 4, referred to above, is as follows:

Brand	Size	Inventory on Hand		
		Dec. 15 1952	Dec. 31 1952	Jan. 31 1953
Lord Calvert				
	one-half gallon.....	15	15	15
	quarter gallon	13
	fifth gallon	118	73	56
	Pint	40	35	28
	one-half pint	56	41	29

Brand	Size	Inventory on Hand		
		Dec. 15 1952	Dec. 31 1952	Jan. 31 1953
Calvert	Reserve			
	one-half gallon	11	9	7
	quarter gallon	132	80
	fifth gallon	196	103	82
	pints	265	217	144
	one-half pint	289	235	151
Carstairs				
	one-half gallon	22	22	22
	quarter gallon	84	84	82
	fifth gallon	67	66	64
	pint	2	2	2
	one-half pint	14	14	14
Calvert	Gin			
	quarter gallon	56	51	31
	fifth gallon	19	14	12
	pint	2	1
	one-half pint	10	9	9

The inventory is of full cases only and does not include individual bottles. [57]

Mr. Ehrlich: (Continuing) Mr. Hutchinson, in answer to Interrogatory No. 5, you attach an exhibit to Interrogatory 5 of the principal suppliers of brands of alcoholic beverages referred to and the periods of distribution of plaintiff, as set forth in Exhibit 1 hereto, and made a part hereof by reference. We would like to have that copied in as a stipulation, that this correctly reflects the matters set forth which I have just read. This was your response to Interrogatory 5.

Mr. Hutchinson: We will stipulate that the inventory shows that. We, however, object on the ground that it is incompetent, irrelevant and immaterial and outside any issues in this case; particularly for the reason that it is not claimed that plain-

tiff violated the restriction on taking on new products in the answer.

Mr. Ehrlich: No, but it goes to the question of damages. We are going to contend, if it ever gets to that issue, that the damages were minimized by these facts.

Well, why don't we leave it go in subject to motion to strike, and get it into the record so we don't have to call witnesses to it?

Mr. Hutchinson: Well, if it is being offered in mitigation, that is a point that hadn't occurred to me. But if we could reserve our objection stated until that time, we would have no objection to having it incorporated in the record. [58]

Mr. Ehrlich: Then the reporter will copy in the response to Interrogatory No. 5.

Reporter's Note: Response to Interrogatory No. 5 referred to above is as follows:

The principal suppliers from whom plaintiff purchased alcoholic beverages for resale during the period indicated include the following (unless otherwise indicated, purchasing was initiated prior to March 1, 1952):

Manufacturer or Importer: 1. Parrot & Co. Period: Throughout. Principal trade names: Teachers Scotch, Hennessy Cognac, Gordon's Gin.

2. The Fleischmann Distilling Corporation. Period: Prior to May 1952. Principal trade names: Fleischmann's Preferred, Fleischmann's Gin. Period: Resumed July 20, 1953 to date. Principal trade names: Black & White Scotch, Churchill's Old Heirloom.

3. James A. Barclay & Co. Ltd. Period: Prior to August, 1952. Principal trade names: Corby's Whiskey and Gin, Barclay's Whiskey and Gin, The Grand Macnish.

4. Associated Brands, Inc., Melrose Sales Division. Period: March, 1953 to date. Principal trade names: James E. Pepper, Echo Springs, Melrose Gin, Old Charter, Old Quaker, Three Feathers, Wilken's.

5. Brown-Forman Distillers Corp. Period: Prior to May, 1952. Principal trade names: Old Forester, King Black Label. [59]

6. Browne Vintners Co., Inc. Period: Prior to December, 1953. Principal trade names: White Horse Scotch, Mumm's Champagne, Christopher, Columbus Rum.

7. American Distilling Co. Period: Throughout. Principal trade name: Meadwood.

8. James B. Beam Distilling Co. Period: Throughout. Principal trade names: Jim Beam, Colonel Jim Beal, Beam's Pin Bottle, Beam's Bond.

9. Glenmore Distilleries Co., Inc. Period: Throughout. Principal trade names: Kentucky Tavern, Glenmore's Silver Label, Old Thompson.

10. Old Joe Distillery. Period: May, 1952 to date. Principal trade name: Joe Louis.

11. Hiram Walker, Inc. Period: Throughout. Principal trade names: Imperial, Walker's Deluxe, Canadian Club, Walker's Gin, Hiram Walker's Cordials, Ten High, Meadowbrook Rye.

12. Bellows & Company. Period: Throughout.

Principal trade names: Bellow's Reserve, Partner's Choice, Bellow's Club Bourbon.

13. Julius Wile Sons & Co., Inc. Period: Throughout. Principal trade name: D.O.M., Garnier Cordials.

14. W. A. Haller Corporation. Period: March, 1952 to date. Principal trade names: Haller's Reserve, Haller's 89, Haller's Gin, Haller's County Fair, Haller's SRS.

15. J.T.S. Brown & Sons. Period: Throughout. Principal trade name: J.T.S. Brown.

16. Italian Swiss Colony. Period: Throughout. Principal trade name: Brandy, Wines. [60]

17. Park & Tilford Distillers Corporation. Period: Prior to July 21, 1952. Principal trade names: Park & Tilford Reserve, Kentucky Bred, Booths Hi & Dry Gin, Booths House of Lords Gin, Vat 69 Scotch, Martell's Cognac, Harvey's Ports and Sherries.

18. Christian Bros. Period: Throughout. Principal trade name: Brandy, Wines.

19. Leroux & Co. Period: Throughout. Principal trade names: Complete line of Leroux cordials and brandy.

20. Beringer Bros. Period: Throughout. Principal trade names: Brandy, Wines.

21. Wentz Bros. Period: Throughout. Principal trade name: Wines.

22. Concannon Vintage Co. Period: Throughout. Principal trade name: Wines.

23. O. Riccadana Co. Period: Throughout. Principal trade name: Vermouths.

24. Tavi Co. Period: Throughout. Principal trade name: Vermouths.

25. Prunier Cie. Period: Throughout. Principal trade names: Prunier B & S Cognac, Prunier Hostellerie Cognac.

Mr. Ehrlich: (Continuing) There is one other thing: In response to your Interrogatory No. 21, we gave you an answer to the interrogatory as to your inventory of merchandise on hand. This goes as to the defense to count 2, and our records show that we had received this information from you contained in our answer to Interrogatory 21, and we would like to get that into the record without going through the originals.

Mr. Hutchinson: Well, I think we can accomplish that. [61] However, these inventory records, as I understand it, would be shown to relate to the first of the month and not to the 15th, and for that reason we would object to this particular information on the ground that it is incompetent, irrelevant and immaterial, and too remote to the time when the order of December 15, 1952, was placed and the time when it would have arrived, the inventory would be different, and that this does not show that.

Mr. Ehrlich: This shows the plaintiff's sales to retailers September, 1951, to February, 1952, that is, the preceding six months, which permits us to, we contend, reject your order on the basis of the average 45-day inventory.

Mr. Hutchinson: In order to save you time, and subject to the right to show an error if that should be the case, we would stipulate that so-called deple-

tion report, which shows what is outlined in parts A and B of the answer to Interrogatory No. 21, subject to our objection that there is no issue presented that the order was rejected nor any averment that the order was rejected for that reason.

Mr. Ehrlich: Then the reporter will copy A and B of the answer to Interrogatory 21.

Reporter's Note: Answer to Interrogatory No. 21:

(a) (b) Plaintiff's Sales to Retailers (Cases)

September, 1951-February, 1952 [62]

	Lord Calvert	Calvert Reserve	Calvert Gin
Sept. 1951	174	564	19
Oct. 1951	250	1009	90
Nov. 1951	147	469	14
Dec. 1951	341	766	32
Jan. 1952	206	409	20
Feb. 1952	39	116	9
	<hr/>	<hr/>	<hr/>
	1157	3333	184
Average Monthly Sales	193	555½	31
45 Day Inventory	289½	833¼	46½
Plaintiff's Inventory			
December 15, 1952	242	893	87
Plaintiff's Order Dated			
Dec. 15, 1952	100	775	25
	<hr/>	<hr/>	<hr/>
	342	1668	112

Mr. Hutchinson: We would like to offer certain answers of the plaintiff's interrogatories addressed to the defendant. Portions only of Answers No. 14—

Mr. Ehrlich: (Interposing) Will you take them one at a time so we can determine if we have any objections?

Mr. Hutchinson: Yes. Answer to Interrogatory 14,

page 4 of the Answers, commencing at line 28, and I will read it, if I may.

Mr. Ehrlich: Well, let me read it first and see if I have any objection.

Mr. Hutchinson: Very well. [63]

The Court: It is now 12:00 o'clock, gentlemen. You will have plenty of time to look into the matter so you won't be pressed in making up your mind.

Mr. Hutchinson: Very well.

Mr. Ehrlich: Well, would counsel give me now, before recess, the different answers he wants admitted? We can look into them during the noon hour. You say No. 14, line 28 to the end?

Mr. Hutchinson: And 15, line 20 to the end. Answer 19 on page 6 from the beginning to the word "notify" on line 16.

Mr. Ehrlich: That is all?

Mr. Hutchinson: Yes.

The Court: Take an adjournment to 2:00 o'clock.

(Thereupon this court was adjourned to the hour of 2:00 o'clock p.m.) [64]

Wednesday, January 16, 1957, 2:00 o'clock

Mr. Ehrlich: If the Court please, I have gone over the requests for stipulation as to some of the answers to interrogatories, and based on my legal position I regret I can't accommodate you because, of course, I will have to make specific objections if you seek to elicit that testimony.

Mr. Hutchinson: And you have particular reference to the portions of the——

Mr. Ehrlich: (Interposing) To the portions you

gave me. I reviewed them and my various objections go to many of the testimony under the circumstances here.

Mr. Hutchinson: There is no suggestion that the interrogatories and answers as indicated are incorrect?

Mr. Ehrlich: Oh, that isn't it. The question of proof doesn't enter into it. It is a question of our legal position, and to protect the record, as the Court suggested this morning.

Mr. Hutchinson: If the Court please, in that circumstance we will then offer with respect only to the First Cause of Action these portions of the answers of defendant to plaintiff's interrogatories 14, 15 and 19. I will read them.

Mr. Ehrlich: Pardon me. Should we make our objection before they go into the record, your Honor, or would your [65] Honor rather have them read? This way I don't like the answers to go into the record. Normally you would have a witness on the stand and propound a question to him, and then I could make a timely objection before the contents went into the record, and your Honor would make a ruling.

The Court: This is the answer, is it?

Mr. Hutchinson: Yes. This is part of the discovery proceedings, your Honor, and these are verified answers to interrogatories propounded to the defendant. I believe they are a part of the record.

The Court: I will allow them subject to your motion to strike and over your objection.

Mr. Ehrlich: May I make my objection prior to the reading of them?

The Court: You may.

Mr. Ehrlich: If your Honor please, I object to the introduction of the particular portions of the answers to the interrogatories which Counsel has just specified. I won't argue them at this time. I will just make the objection on the ground that the contract is illegal and void, in violation of the Constitution and public policy and the Alcoholic Beverage Control Act of the State of California. And count one states no claim for relief.

The second objection is that count one states no claim for relief. [66]

The third objection, count three does not state a claim for relief.

Next objection, that the testimony is incompetent, irrelevant and immaterial.

The next objection, that the testimony will not prove any of the issues or any material fact.

The next objection is that the admission of this type of testimony would violate the parole evidence rule in that it seeks to vary the terms of a written instrument by oral testimony; that it violates the provisions of Section 1638, 39 and 1698 of the Civil Code and 1658 of the Code of Civil Procedure.

And finally, two objections: No proper foundation has been laid for any oral testimony with respect to the written contract, and the final objection that paragraph 16 provides that it can only be modified by written agreement.

The Court: I am not familiar with the offer

which Counsel has made. Has it to do with oral testimony in relation to the contract?

Mr. Ehrlich: That is what it has, your Honor.

The Court: I will give you an opportunity to be heard.

Mr. Hutchinson: Yes, your Honor, if I may briefly respond to Counsel's objections as I hastily noted them.

First, as indicated, this is being offered exclusively with regard to the first cause of action. It is being [67] specifically offered to show conduct of the defendant, or Calvert that is, as its predecessor was at that time, and for the limited and exclusive purpose of aiding the Court to interpret the word "promote".

The Court: I will have no difficulty doing that at all. It is a commonplace word. It speaks for itself.

Mr. Hutchinson: I believe, if your Honor please, that in any particular field the word may have a significance different than others.

The Court: Yes, I understand.

Mr. Hutchinson: And our purpose was to place this in the record for that purpose.

The Court: In any event, in the interest of time, so that both sides are protected by a record, I will allow it to go in subject to motion to strike and over your objection, then we can get it directly so there will be no question about it.

Mr. Hutchinson: Thank you, your Honor. The portions indicated are, first, page four commencing at line 28 in the answer to interrogatory fourteen

propounded to the defendant by the plaintiff, as follows:

“Defendant employs and has employed during the period January 1, 1952, to date persons known as ‘specialty men’, sometimes called ‘missionary men’. These employees are authorized to call upon retailers of alcoholic beverages within [68] the counties of Alameda and Contra Costa, State of California, only for the purpose of promoting the sales of the defendant’s product.”

And the following from the answer of the defendant to plaintiff’s interrogatory number fifteen on page 5 of defendant’s answers, commencing at line 20 through line 25, as follows:

“‘Specialty men’ employed by defendant during the period January 1, 1952, to date were and are instructed that if in the course of their promotional work a retailer indicates that he desires to purchase defendant’s products, that information is to be passed along to the wholesaler of the retailer’s choice.”

And the following from defendant’s answer to plaintiff’s interrogatory number nineteen, appearing on page 6 of the answers, lines 11 through 16:

“If in the course of their promotional work defendant’s ‘specialty men’ discovered that a retailer desired to purchase defendant’s products, they would ask the retailer for the name of the distributor with whom the retailer desired to do business. After the retailer had designated a distributor, the distributor selected would be notified.”

Now, your Honor, I would like call on Mr. Lind for a question or two.

Mr. Ehrlich: If your Honor please, I will [69] preserve my right to strike until the end of the plaintiff's case, and then make my various motions and the motion to strike.

The Court: Very well.

FREDERICK J. LIND

called as a Witness on behalf of the Plaintiff, being first duly sworn, testified as follows:

The Court: Your full name, please.

A. Frederick J. Lind—L-i-n-d.

The Court: Where do you live, Mr. Lind?

A. In Old Greenwich, Connecticut.

The Court: And your business or profession?

A. I am an attorney. I am a lawyer, sir.

The Court: Take the witness.

Direct Examination

Q. (By Mr. Hutchinson): Mr. Lind, I believe you are and for a number of years have been employed as an attorney, at least from time to time, by the present defendant in this action and formerly by its predecessor, Calvert Distillery Corporation, is that correct? A. That is correct.

Mr. Hutchinson: If the Court please, we would like to examine this witness as an adverse witness.

The Court: Let the record so show.

Q. (By Mr. Hutchinson): Mr. Lind, in connection with your professional work on behalf of the defendant, and formerly [70] for Calvert, did

(Testimony of Frederick J. Lind.)

you have occasion to review or draw contracts used by the defendant and Calvert in dealing with its distributors and others? A. I have.

Mr. Ehrlich: If your Honor please, may I have the objection I have heretofore made to all this line of testimony without having to repeat it?

The Court: Let the record so show.

Q. (By Mr. Hutchinson): Now, Mr. Lind, in connection with the contracts of Calvert Distillery Corporation you have had occasion, have you not, to examine paragraph eleven of the contract which has been introduced in evidence as plaintiff's Exhibit 1 in this case? A. I have.

Q. Did you have acquaintance and do you have now a recollection as to paragraph 11 of a similar printed contract prepared for Calvert which was entered into with one or more distributors during the year 1953?

Mr. Ehrlich: If your Honor please, I would like to make a special objection to that. The fact that this defendant may have changed its contract once or ten times has nothing to do with or has any competency or relevancy or materiality as to the construction which this Court will give to this contract. We may have changed it for any number of reasons, and the fact that it has been changed has no place in this litigation [71] whatsoever.

Mr. Hutchinson: If the Court please, our purpose is to show conduct of the parties as interpreting a contract contrary to their position taken in this action. A typical admission type of action.

(Testimony of Frederick J. Lind.)

Mr. Ehrlich: That isn't a true statement. That is not an interpretation of this contract before the Court. You are now asking this witness about some other contracts that have been drafted. It has nothing to do with the exhibit attached to the complaint. He is asking for future contracts. We may have had ten since then. How could that aid your Honor in your interpretation of that provision of the contract? I submit my objection.

Mr. Hutchinson: We are talking about the immediately succeeding period, your Honor, in which that portion was changed to provide, as we see it, for the thing they now argue for here with regard to the earlier contract, wording.

The Court: What relation has the earlier contract to this contract in question here?

Mr. Hutchinson: This is the kind of contract that Calvert prepared immediately following the one in question.

The Court: The objection will have to be sustained.

Mr. Hutchinson: May I make a statement of what I expect the witness, if permitted to testify, would have said in that regard, your Honor, in the form of an offer? [72]

The Court: Now you have made your offer of proof, or attempted to, and I have ruled on it. That is a complete record.

Mr. Hutchinson: But I wanted to indicate the specific change that occurred, your Honor.

(Testimony of Frederick J. Lind.)

The Court: But I sustained the objection.

Mr. Hutchinson: I appreciate that.

The Court: Now you want to what?

Mr. Hutchinson: I simply want to make an offer as to what I expect this witness would testify to, in order that it may be in the record what we hoped to prove by this witness.

The Court: What you hope to prove?

Mr. Hutchinson: By this witness, that he would testify that for the year 1955——

The Court: Just a moment. Ask another question and I will rule on it so you will have a record.

Mr. Hutchinson: Very well.

Q. (By Mr. Hutchinson): Mr. Lind, in the case of the 1953 purchase form of contract for Calverts, is it not a fact that paragraph 11 of that contract in that year read as follows:

“This contract shall be effective for a period of blank years”—in the printed form from March blank, 1953. “If distributor desires to renew the contract, he shall apply for renewal not less than thirty days before March 1, 1954”?

Mr. Ehrlich: I renew my objection your Honor, on the [73] ground that what some future contract may contain has no relevancy or materiality and can in no way aid your Honor in your interpretation of the plain provisions of this contract.

This contract with its clause, with its provisions, is before your Honor. It is a matter of law. There is no evidence admissible of any kind. It is a plain, simple contract, as your Honor said this morning.

(Testimony of Frederick J. Lind.)

What we did subsequently or previously is no concern of this court. Your Honor has this before you, so I renew my objection as to the competency, relevancy and materiality.

The Court: Matter submitted?

Mr. Hutchinson: I think we argued the matter, your Honor. I wanted to complete the offer. I am confident it is proper interpretive evidence.

The Court: Objection will be sustained.

Mr. Hutchinson: I have no further questions of Mr. Lind. Thank you, sir.

Mr. Ehrlich: No questions.

Mr. Hutchinson: I will call Mr. Lewis, please.

FRANKLIN LEWIS

called as a Witness on behalf of the Plaintiff, being first dully sworn, testified as follows:

The Court: Your full name, please.

A. Franklin Lewis.

The Court: Where do you live, Mr. Lewis? [74]

A. 2160 Vicksburg Avenue, Oakland.

The Court: Your business or occupation?

A. Salesman.

The Court: Proceed.

Direct Examination

Q. (By Mr. Hutchinson): Mr. Lewis, what is your business or occupation?

A. I am a salesman.

Q. How long have you been engaged in sales work?

A. Approximately twelve years.

(Testimony of Franklin Lewis.)

Q. Were you formerly employed by Calvert Distillery Corporation? A. Yes.

The Court: Speak up so the reporter can hear you. A. Yes, sir.

Q. (By Mr. Hutchinson): You have received a subpoena to appear in this action, have you?

A. Yes.

Mr. Hutchinson: If the court please, in view of the witness' former employment by the predecessor of the defendant, we would like to conduct this examination as an adverse witness.

Mr. Ehrlich: He is not the type of executive that comes under 2055, so we object on the ground that he doesn't come within the provision of the Code. If Mr. Hutchinson desires [75] to question him, he must question him as his own witness. He is a salesman, formerly a salesman for Calvert, and that isn't in the designations provided in the Code.

Mr. Hutchinson: If the Court please, I believe that Section 2055, Code of Civil Procedure, is a purely procedural step. Furthermore, I have just been advised—May I have one question on voir dire of this witness?

The Court: Surely.

Mr. Ehrlich: Were you discharged by Calvert?

The Witness: Yes, I was.

Mr. Hutchinson: We will object to that on voir dire.

Mr. Ehrlich: So he can't be an adverse witness after he has been discharged—further ground of objection.

(Testimony of Franklin Lewis.)

Mr. Hutchinson: If the Court please, the question on that, at least, the highest court in California has held the question is when the transactions occurred concerning a person employed by the opposing party and not when he appears as a witness. In other words, former employees of the opposing party——

The Court: (Interposing) But he has been discharged.

Mr. Hutchinson: Yes, but the rule seems to be, whether or not they are adverse, seems to be whether they occupied the position at the time of the transactions, and not at the time of testimony. I can cite your Honor a quite recent California case on that point which I think is persuasive if not [76] controlling.

Mr. Ehrlich: I haven't the code section here, your Honor, but I am satisfied that it specifies specifically the executive—if we have the code, I think we could settle this in a minute.

The Court: Have you got the code here, Counsel?

Mr. Hutchinson: I don't have the code of civil procedure, no, your Honor.

The Court: Get me the code of civil procedure. What objection do you have to questioning this witness as your own witness?

Mr. Hutchinson: I can quite conceivably have him testify. His testimony would be the same either way. The question of being an adverse witness, naturally we can direct our questions by leading

(Testimony of Franklin Lewis.)

questions and save a great deal of time, among other things.

Also, if as Counsel suggests they wish to make some point they have in mind of what this gentleman as a manager did, we would prefer to have it as an adverse witness so that we are free to reject it if need be.

The Court: Under the conditions now and the showing made I am inclined to agree with Counsel, so you may get any law that you have to the contrary.

Mr. Hutchinson: I believe I have a note of cases that so hold. There is a California case. I don't recall the [77] federal courts so holding.

The Court: I suggest that you withdraw this witness and call your next witness so that you will have an opportunity.

Mr. Hutchinson: I think, your Honor, the examination will go in in the same manner, so rather than take the Court's time, I will proceed.

Q. (By Mr. Hutchinson): During what period of time did you work for Calverts Distilling Corporation, Mr. Lind?

A. From February, 1947, to October 14th, 1956.

Q. During that time did you have any geographical area in which you were directed to work?

A. Yes, I did.

Q. And what was the area in which you did work?

A. Well, the first year or so that I was with the distillery I didn't work locally. I was doing public

(Testimony of Franklin Lewis.)

relations work completely and travelling with a film.

I worked from Bakersfield to the Oregon line, and I worked northern Nevada, all of northern California. But I was assigned a territory and the territory was—originally it included Richmond, El Cerrito, Albany, Emeryville, Berkeley, metropolitan Oakland as far as Lake Merritt, Alameda. Then when Calvert hired additional manpower Richmond was eliminated from my territory. I still worked geographically as far as Lake Merritt, continued to work El Cerrito, Albany, Emeryville, [78] and the remainder of them.

Q. Now, during that time when you were working in the East Bay were you directed to work with any of the distributors who handled Calvert's products?

A. Yes, sir.

Q. In that connection did you deal with the Key Distributing Company, a division of J. C. Millett Company, the plaintiff here?

A. Yes.

Q. Can you tell us very briefly how you worked on behalf of your company, Calvert, with the Key Distributing branch insofar as the two were working together?

Mr. Ehrlich: Wait a minute. We make the same objection that we have heretofore raised to this question. We have the written agreement. It speaks for itself. Your Honor has stated the word "promote" is a plain, simple English word and you understand what that means. This is purely directed to the contract here, which needs no interpretation from this witness.

(Testimony of Franklin Lewis.)

And by the way, I might just point out in passing that Rule 43 of the Federal Rules says that a party—this is your rules, your Honor—a party may call an adverse party or an officer, director or managing agent of a public or private corporation. I didn't know at the time that the federal rules had a limitation as to officer, director, managing agent of [79] a public or private corporation.

Mr. Hutchinson: As to Counsel's first objection, if it was one, we are not trying to interpret the contract. We are trying to show what was done and whether it conformed with the contract or whether it was a breach.

The Court: Reframe your question so that I may follow it. I didn't follow it clearly.

Mr. Hutchinson: Yes, your Honor. Our purpose here——

The Court: No, reframe your question.

Mr. Hutchinson: Oh, yes. Would you like the reporter to read it, or I can restate it?

The Court: I suggest you restate the question.

Q. (By Mr. Hutchinson): In carrying out your work for Calvert Distillery Corporation, Mr. Lewis, can you tell us just what you did insofar as your dealings, your personal dealings, with the Key Distributing branch of the plaintiff, J. C. Millett.

Mr. Ehrlich: We object on the grounds it is incompetent, irrelevant and immaterial what this man did in connection with his activities for Calvert Distillers.

He has pleaded here that we breached the con-

(Testimony of Franklin Lewis.)

tract because we failed to turn over to the plaintiff the retailers whom we solicited and took orders for, and his activities under the contract are of no concern. The only damage under the first count arises out of our failure to turn over to [80] him—I will read it: “By reason of the facts stated and by reason of the failure, neglect and refusal by defendant to submit to Key Distributing orders solicited and obtained by salesmen of the defendant according to the terms of said implied condition of the agreement plaintiff has suffered damages in the sum of twenty-five thousand dollars.”

So the other activities are not at issue in the case, or any other activities. And of course that is the illegal activity that they are basing their damages on.

The Court: For the purpose of the record, what is the purpose of this offer?

Mr. Hutchinson: The purpose of this offer, your Honor, is to show that under the provision of the contract requiring Calvert to promote its products in support of the plaintiff this man was assigned to that work.

The Court: For that limited purpose I will allow it.

Mr. Hutchinson: Thank you.

Q. (By Mr. Hutchinson): Do you remember the question?

A. I would like to hear the question repeated.

Q. The question very briefly is, without changing it if I can word it as Counsel wants to retain his

(Testimony of Franklin Lewis.)

same objection and rulings, will you tell us briefly what you did in conjunction with your work for your employer, Calvert, in dealing with the Key Distributing branch of the plaintiff.

Mr. Ehrlich: May I have all my original [81] objections, your Honor?

The Court: The record so shows.

Mr. Hutchinson: That is the understanding.

The Witness: Shall I answer?

Mr. Hutchinson: Yes.

The Witness: A. My work consisted of promoting the sale of Calvert merchandise by placing point of sale material; showing our newspaper, magazine, billboard and card programs; to tell the Calvert story.

We had a story to tell at the time about the merits of our merchandise over and above the competition's merchandise. To work with the wholesale people. To, as we called it, "high spot" with them when they felt that they would like to sell our merchandise against competitive labels, particularly at the bar level. I am talking now in terms of plus business or what we call—

The Court: (Interposing) I didn't follow that "high spot".

A. "High spot" merely means, your Honor, that at the request of the wholesale salesman, if he has a specific call—for example, for me to make a specific appointment with him, make a call and tell my story as against whatever we are trying to sell against. The wholesale man consummates the sale

(Testimony of Franklin Lewis.)

if he is able to. I contribute what I think I can.

We have had many such requests all through the years [82] from our wholesalers. I started with Calvert when we had a multiple wholesale arrangement. As I say, my job was to promote the sale of Calvert merchandise, help the wholesale people in any possible way that I could.

Mr. Ehrlich: I move to strike the answer on the grounds heretofore stated.

The Court: The motion will be denied.

Q. (By Mr. Hutchinson): Now, did you occasionally or regularly call on the plaintiff's Key Distributing branch to inquire whether any assistance was needed by you on a particular day or at any other time.

Mr. Ehrlich: Same objection, your Honor.

The Court: Same ruling.

The Witness: Should I answer?

The Court: You may answer.

The Witness: Well, during most of the time that we had the dual arrangement with Key and Julliard, I worked up at the Julliard House, but also worked with the two people periodically when my geographic area was the area in which they worked.

In other words, we had another man that was geographically assigned to the East Oakland area, working out into the other outlying areas. He was known there. I was known west of the lake. Consequently, he was of little value to the Key people of my side of the city and in the area that I [83] had covered for years, so the Key people would

(Testimony of Franklin Lewis.)

ask me to high-spot those specifics with them, at their request, which I did.

Q. In that connection, did you have occasion to furnish, on behalf of your employer, so-called point-of-sale material to the chief branch or the retailer?

Mr. Ehrlich: Same objection, your Honor.

The Court: Same ruling.

A. Yes.

Q. (By Mr. Hutchinson): Could you tell us very briefly what you mean by "point-of-sale material"?

A. Point-of-sale material——

Mr. Ehrlich: Same objection.

The Court: You have your objection running to all this testimony.

Mr. Ehrlich: Thank you.

The Witness: Point-of-sale material is designed to promote the sale of ours and anyone else's merchandise. I mean, that applies, of course, to the whiskey business, and it applies to any merchandise or any product, at the point of sale or as near the point of sale as possible. To illustrate, it probably could be a counter-piece, a package outlay, it could be a floor piece, it could be anything that would help promote the sale of our goods.

Q. (By Mr. Hutchinson): Essentially the point-of-sale material, if I understand you, was a rack or sign to attract [84] attention.

A. That's right.

Q. Now, in calling on retailers, did you, as part of your work for Calvert, call on retailers who were purchasing or not purchasing Calvert's products to

(Testimony of Franklin Lewis.)

see if anything could be done to promote that production, independently of any particular wholesaler's previous appointment? Do you understand what I mean?

A. I want to be sure I understand.

Q. Well, perhaps I can make it very short. Did you occasionally or regularly call on retailers, licensees as they are called, without being accompanied at the time by a wholesaler from the sales force?

A. Yes.

Q. In that connection, did you call for the purpose of presenting such point-of-sale material?

A. That and specific approach to whatever our particular promotion was at that time of the year, and try to increase the sale of our goods.

Q. And in that connection would you review with the retailer the inventory of Calvert and Carstair products?

A. Oh, yes.

Mr. Ehrlich: Same objection, your Honor.

The Court: What was that?

Mr. Ehrlich: Whether he reviewed the [85] retailer's inventory.

The Court: It will go out. Objection sustained.

Mr. Hutchinson: Q. Did you look at the retailer's inventory in making such calls to see whether there were any Calvert and Carstair brands?

A. Yes.

Q. And if you found Calvert's, did you look at the inventory to see whether they were out of one size or the supply was short for anything?

A. Naturally. That's elementary. Not only that,

(Testimony of Franklin Lewis.)

but as you call on the trade through the years, as you become better acquainted with them, you pretty well know what is in the back room. I mean by that, your Honor, how much of our merchandise they have on hand, give or take a bottle, so that we know when it is time to try to encourage the sale of additional merchandise by our wholesalers.

I am not talking in terms of just shelf stock, but if you know your account well enough, you have a pretty good idea, allowing that you will miss by a case or so. And generally you have access to the back room, and if there is something in the back room that you want—our job is to get it out on the floor where it can be seen.

The Court: I wouldn't think they would take that much of a chance.

The Witness: Oh, yes, your Honor, in some instances. [86]

Mr. Hutchinson: Q. Now, in dealing with retailers are there two general types of retailer purchasers?

A. Yes, there is the package outlet and the bar outlet.

Q. Now, to take the package—

The Court: Pardon me, just so I follow this testimony. What is there in the contract with relation to promotion?

Mr. Ehrlich: I will read it to your Honor. I read from paragraph 6.

"Calvert agrees to promote the sale of its products and to advertise its products in a manner con-

(Testimony of Franklin Lewis.)

sistent with the type of merchandise and cases sold. Calvert shall have the sole right to determine the amount of sales promotion and advertising and the media used for advertising.”

I have just let this go on, your Honor, but I don’t see any competency or relevancy to it.

The Court: And the purpose for this testimony, so the record will be clear, is what?

Mr. Hutchinson: To show how promotion was carried out, your Honor, and then the next step will be to show how it was shut off arbitrarily, in support of our First Cause of Action.

Mr. Ehrlich: But that isn’t what they are suing for, your Honor.

Mr. Hutchinson: Yes, it is.

Mr. Ehrlich: No, it is here specifically in your own [87] language, counsel: “By reason of the facts hereinbefore stated, and particularly by reason of the failure, neglect and refusal by defendant to submit to Key Distributing Company orders solicited and obtained by salesmen of the defendant in the counties of Alameda and Contra Costa.” There is not a word in the contract requiring us to do this. This is the oral agreement they are trying now to superimpose upon this written contract, and that is why I have made these very specific objections to this.

The Court: If there is any objection to this line of testimony, in the interests of time I think we will go along and get the record so that you don’t waive any of your legal rights. Let’s proceed.

(Testimony of Franklin Lewis.)

Mr. Hutchinson: Q. I believe, Mr. Lewis, you stated that there were package houses and the on-sale establishments. A. Yes.

Q. Now, in the case of a package house, is there any preferred petition for particular merchandise for the purpose of sale to the consumer?

A. Yes.

Q. Do I understand that the way it is displayed on the shelves or in the windows or in the center of the floor has an effect upon the purchasers seeing it and demanding it?

A. All of that contributes to sale.

Q. And that was one of the functions with which you aided [88] the wholesalers or distributors, arranging suitable places for these things.

A. That is true.

Q. Now, in the so called bar accounts, was there any preferential type of distribution possible there? In other words, what was the most desirable kind of display for use of the merchandise in the bar accounts? A. Well, again, eye level.

Q. I beg your pardon.

A. Eye level at the back bar. At the level of your eyes, or as close to it as possible as you are sitting on a stool, to attract your attention. Well, for example, you try to get a bottle of Lord Calvert where it can be seen, or where possibly an impulse might indicate that you might order that over and above something else.

Q. Now, with regard to the resale by the retailer, the bar account, was there any name given to

(Testimony of Franklin Lewis.)

the volume of sales, the kind of thing that would be served if no specification were given by the particular customer? I think it is called "pouring whiskey" or "pouring gin", or whatever, is that it?

A. That is correct.

Q. So that if you could induce, for example, the bar owner to serve Calverts whenever someone asked for bourbon, that would account for the major sales in that establishment of bourbon? [89]

A. That is right.

Q. Did you attempt to aid the wholesaler in securing a pouring account for Calverts and Carstairs products?

A. Indeed I did.

Q. Now, in your independent calls on retailers what happened, if it did happen, when the retailer needed some further Calvert products to complete his stock or, if he didn't have any, to install the item in his place? What would you do if you found that situation?

A. You mean what I did leading up to the actual sale, which I cannot write?

Q. That is right.

A. Allowing that there was any appreciable quantity, contact the wholesaler specified by the retailer, and he would consummate the sale if possible either with the help of the specialty man or by himself.

Q. Now, you did that, did you, or did you not?

A. Yes, indeed I did.

Q. Were you in general instructed to carry out

(Testimony of Franklin Lewis.)

the activities you have described by your superiors?

A. Yes.

Q. Who was your immediate superior in the East Bay at that time in the Calvert organization?

A. Well, I had no immediate superior in the East Bay then, but in the district the offices were on Montgomery Street in [90] San Francisco. My immediate superior was Bernard Garfield.

Q. He was the man you reported to and considered your superior, is that right?

A. That is correct.

Q. Now, with relation to the summer of 1952, June or July, was there any change made in your activities on behalf of Calvert in those things that you have been describing?

A. Yes, there was.

Q. Did that all come about by reason of something said to you by Calvert personnel?

A. Yes.

Q. Was this at a meeting of some kind?

A. Yes. The specific meetings were—well, you see, this didn't concern but two people, actually. There were only two of us working in my area that would be affected by this particular thing.

Q. I see. Who talked to you about some change that was going to happen in the East Bay so far as Calvert promotion was concerned?

A. The specific times?

Q. Yes. I am thinking now of the year 1952, around mid-year.

A. Mr. Garfield and Mr. Taube.

(Testimony of Franklin Lewis.)

Q. Who is Mr. Taube?

A. Mr. Taube at that time was division manager for the western division. [91]

The Court: Did you have a conversation with him? A. Yes, sir.

The Court: Who was present?

A. At that particular time? No one.

The Court: Where was this?

A. Well, it was in the district office in San Francisco.

The Court: Morning or afternoon?

A. I don't recall, your Honor. That is five years ago.

The Court: Proceed.

Mr. Hutchinson: Q. So that there was yourself, Mr. Taube and Mr. Garfield at that time, is that correct?

A. Thereabouts. I say no specific time, but I have had conversations with both of them.

Q. With regard to the first conversation you had on the subject of some change in the way you would carry out your work, was Mr. Taube present?

A. I beg your pardon?

Q. The first time this subject was discussed was Mr. Taube present? A. No.

Q. Then the conversation was between you and Mr. Garfield. A. That is correct.

Q. Now, in this conversation, would you give us the approximate date?

A. Well, it was coming up to our summer WWW promotion, [92] which was a very heavy, or

(Testimony of Franklin Lewis.)

was at that time, a very heavy promotion of the Calvert organization.

Q. What time of year did that usually relate to?

A. During the summer months, June, July and part of August, I think.

Mr. Ehrlich: Is this 1952?

A. Yes.

Mr. Hutchinson: Q. What, if anything, was said with regard to promotions by you in your work in the Key Distributing Branch of the plaintiff?

Mr. Ehrlich: Your Honor please, I again want to renew my objection heretofore made, and call to your Honor's attention we are not concerned with anything but the alleged damage arising out of our failure to solicit and deliver to them orders which we received from the retailers, whom it was illegal for us to contact.

Mr. Hutchinson: I think we have been over that before, your Honor. We are trying to show that they ceased to do the promotion work that they had been doing on behalf of this distributor and all the others they had in the Key area.

Mr. Ehrlich: That isn't the charge in the complaint.

Mr. Hutchinson: Yes, it is.

Mr. Ehrlich: I again read to your Honor that count one is explicitly restricted—I don't want to be redundant about it, but here is what they say again: [93]

“By reason of the facts hereinbefore stated, and particularly by reason of the failure, neglect and

(Testimony of Franklin Lewis.)

refusal by defendant to submit to Key Distributing Company orders solicited and obtained by the salesmen of defendant within the counties of Alameda and Contra Costa for delivery according to the terms of said implied conditions of said agreement, the plaintiff has been damaged in an amount estimated at \$25,000."

There is not one word in the first count or in any portion of this complaint having reference to any so called promotion work except this illegal condition and this contractual obligation which they are trying to superimpose on this contract. So whatever we did, assuming we breached the contract in other aspects of promotion work, the only thing they complain about and the only one they plead in this complaint is this illegal one of soliciting orders and failing to turn them over for delivery. Nothing else is complained about.

Mr. Hutchinson: If the court please, the complaint in part reads:

"One of the conditions of the said written agreement was that the defendant agreed to promote the sale of its products by continuing to employ salesmen sometimes known as 'specialty men' within the counties of Alameda and Contra Costa in the manner and for the purpose specified above.", and so on.

Mr. Ehrlich: Go on, read on. "and submit the orders so solicited and obtained". [94]

Mr. Hutchinson: We allege they agreed to promote the sales by use of these men, and that they

(Testimony of Franklin Lewis.)

did continue to employ them, but diverted the fruits of their work, orders of which they were informed, et cetera, to the competitors and not to our people.

Mr. Ehrlich: And the only allegation of damage which you allege is allegation ten, by reason of our failure to turn over orders solicited and obtained you suffered damages. There is no other statement of any violation of any provision of the so called promotional activity. There is not one word in your complaint regarding any promotional activity except this alleged implied oral agreement on our part.

Mr. Hutchinson: In any case, we have a right to prove what we have alleged, I hope. I think we have been over this ground enough, your Honor. We would like to continue the examination.

The Court: I will allow this testimony subject to your motion to strike and over your objection.

Mr. Hutchinson: Could you read the question, Mr. Reporter?

(Thereupon read: "What, if anything was said with regard to promotions by you in your work in the Key Distributing Branch of the plaintiff"?)

Mr. Hutchinson: Q. Do you understand the question? A. I think so.

Q. Go ahead and answer it. [95]

The Witness: Are you objecting to this?

The Court: Don't you worry about his objections. He will take care of himself.

The Witness: A. I was told specifically—there

(Testimony of Franklin Lewis.)

was another man involved in this, too. We were both told to withdraw all support to Key Distributing Company and not even to put—this isn't a direct quote, but it is as close as I can remember—not even to put our foot in the door.

Mr. Hutchinson: Who was the other man who was involved in this?

A. A man named Joseph Fischer.

Q. Was he a Calvert employee?

A. Yes, and still is.

Q. He is the man you referred to as working beyond Lake Merritt?

A. That is right. Fischer—F-i-s-c-h-e-r.

Q. Was he present when this statement was made to you?

A. I think so. As nearly as I can remember, this was made to us several times.

Q. On some occasions Mr. Taube, the western manager, was present when these statements were made?

A. Well, at least once.

Q. Approximately what time was that?

A. I don't know.

Q. After you were so directed by Mr. Garfield, and either [96] Mr. Taube or Mr. Garfield in Mr. Taube's presence, did you then give any assistance to Key Distributing branch of the plaintiff?

A. None whatever.

Q. In the event a retailer appeared in need or expressed a desire to purchase Calvert products, what if anything were you instructed to say to him in that connection?

(Testimony of Franklin Lewis.)

A. Well merely,—I mean, it's a trick of the trade. It's a way to emphasize one and de-emphasize the other, and over the years you know how to do that.

Q. And you were so instructed?

A. That is correct.

Q. And after this time, in the month of June or July of 1952, until the end of the year did you go to the Key Distributing branch of the plaintiff in connection with your work for Calvert?

A. As everything else at Calvert, they signed the check. I did what they told me to do. I don't think I even walked inside the door.

Q. And you gave no help whatever?

A. None whatever.

Q. Did you have any opportunity to observe what Mr. Fischer did, he apparently also following these instructions.

Mr. Ehrlich: We object to that as hearsay.

The Witness: It isn't hearsay. [97]

Mr. Ehrlich: Well, I ask that that go out.

The Court: It may go out.

Mr. Ehrlich: It seems we have got another lawyer in the case.

The Court: Better let me take care of that.

The Witness: I am sorry, your Honor.

Mr. Ehrlich: As to what Mr. Fischer did, Mr. Fischer is the best evidence.

The Court: Objection sustained.

Mr. Hutchinson: Q. Do you recall how the Key Distributing branch of the plaintiff functioned or

(Testimony of Franklin Lewis.)

performed as a Calvert distributor, in other words, whether it was substantial or otherwise prior to this conversation with Mr. Garfield and Mr. Taube.

Mr. Ehrlich: I object to that as incompetent, irrelevant and immaterial, and calling for a conclusion of the witness. The sales themselves would be the best evidence of whether they were or were not substantial.

Mr. Hutchinson: Well, I wouldn't know whether they were substantial for that kind of operation or not. This witness, I think, is qualified to say whether they were good distributors or bad, whether they hold little or much as distributors go.

The Court: Do you know how much they sold?

The Witness: A. I had access to the figures at that [98] time, and did over some years, and they consistently outsold other wholesalers by possibly——

Mr. Ehrlich: We object to—pardon me.

The Court: Do you see how indefinite that is?

The Witness: Well, I would suggest possibly the figures are available.

The Court: The objection will be sustained.

Mr. Ehrlich: We ask that this go out, your Honor.

The Court: It may go out.

Mr. Hutchinson: Q. Did you have occasion to report at any time prior to the conversation with Mr. Garfield or Mr. Taube in June or July of 1952 as to whether Key Distributing should be continued

(Testimony of Franklin Lewis.)

or discontinued because of its performance or anything of that nature?

Mr. Ehrlich: We object to that as incompetent, irrelevant and immaterial, what this witness' opinion was of our business activities, and whether or not he reported it, and all the other grounds of objection that I have made.

Mr. Hutchinson: I am asking whether he reported it. He was on the ground and he would make reports, obviously, whether he reported whether they were good, or bad.

The Court: Did you make any report in that regard?

A. Well, we——

The Court: Did you or did you not?

A. You mean in my opinion were they good or bad? [99]

The Court: Yes.

A. I think they were excellent.

Mr. Ehrlich: I ask that that go out.

The Court: That may go out, we are concerned with the report.

A. Specific reports in writing, your Honor?

The Court: I don't know what it is.

A. Well, yes, many times I am sure I said they were excellent jobbers.

Mr. Ehrlich: We ask that that go out.

The Court: It may go out, an opinion and conclusion of the witness.

Mr. Hutchinson: Do I understand that the question might be asked as to what he did report liter-

(Testimony of Franklin Lewis.)

ally? Well, I will put the question and we can have.

Mr. Hutchinson: Q. Mr. Lewis, did you report to your superiors either orally or in writing what you observed by way of the activities in distributing Calverts to the distributor in your work with the distributors, including Key Distributors?

A. I am sure that I did. We used to submit daily reports.

Q. You submitted to your superiors a daily report? A. Yes.

Q. That was in writing? A. Yes.

Q. And you had other types of reports, also?

A. Yes.

Q. Now, in both reports did you at any time report that Key Distributing was not performing, or performing, or anything of that nature?

Mr. Ehrlich: In addition to my objections, I raise the objection that the reports are the best evidence.

Mr. Hutchinson: You have control of the reports. If you will produce them we will offer them.

Mr. Ehrlich: You have never made any demand until this minute for them.

The Court: In the interest of time I will allow it subject to the motion to strike.

Mr. Hutchinson: Q. Do you recall the question, Mr. Lewis?

A. I would like to have it repeated.

Mr. Hutchinson: Will you read the question, Mr. Reporter, please?

(Question read by the Reporter.)

(Testimony of Franklin Lewis.)

A. I don't recall ever reporting that they were not performing.

Mr. Hutchinson: Q. Do you have any present recollection of the rate of sales by the Key Distributing branch of the plaintiff of Calvert products during 1952 and prior to the time your efforts were changed by Mr. Garfield and Mr. Taube in this conversation?

A. Do I have any recollection of specific——

Q. Yes, in scores, hundreds, or thousands of cases per month.

A. No. Merely that they outsold Julliard.

Mr. Ehrlich: We ask that this voluntary statement go out. A hostile witness giving testimony to injure us if he can.

Mr. Hutchinson: I think that is out of order and, your Honor, I would like to assign it as misconduct. There is no occasion to abuse this witness.

The Court: Do you know what the answer was?

Mr. Hutchinson: You mean the witness?

The Court: Yes.

Mr. Hutchinson: He said they outsold Julliard.

The Court: He said "no". Didn't you?

The Witness: A. I have no figures.

The Court: That was your answer. How did you answer? You answered "no", did you not?

A. I believe I did.

The Court: Yes. Let's proceed.

Mr. Hutchinson: But Mr. Ehrlich's remark was——

Mr. Ehrlich: (Interposing) He made the state-

(Testimony of Franklin Lewis.)

ment that they outsold Julliard, which was not called for by the question.

Mr. Hutchinson: That is probably the only way that anybody connected with Calvert——

The Court: (Interposing) If you gentlemen aren't careful [102] I will become nervous. Let's proceed with this case.

Mr. Ehrlich: Sorry, your Honor.

Mr. Hutchinson: I am sorry, your Honor. You may cross examine.

Mr. Ehrlich: Should I make my motion now or reserve it to the end of the case?

The Court: Reserve it.

Mr. Ehrlich: Very well. No cross examination.

The Court: Step down.

Mr. Ehrlich: Oh, by the way, how many Calvert distributors were there in Alameda and Contra Costa counties in March of 1952.

A. Well, I think there were two.

Mr. Ehrlich: No questions.

The Court: Step down.

Mr. Hutchinson: Could you name those two?

A. Julliard and Key.

(Witness excused.)

The Court: Call your next witness.

Mr. Hutchinson: If your Honor please, our next witness will essentially go to the question of damages.

The Court: Better reserve your testimony on damages, if that is agreeable.

Mr. Hutchinson: Fine.

Mr. Ehrlich: Perfectly agreeable, your Honor.

Mr. Hutchinson: In that case, then, defendants may proceed with their evidence on liability.

Mr. Ehrlich: Before that, if you don't mind, I want to make a few motions.

If your Honor please, I want to renew—your Honor was kind enough this morning to permit me, in ruling on the motion, you ruled on the motion to dismiss without prejudice and I could renew them. I now want to renew the three motions I made this morning. I am not going to argue them at length. I think we covered them fully.

The first motion is to dismiss the complaint and the three counts on the ground that the contract which they have pleaded in their complaint is illegal and void and violative of the Constitution, the public policy and the Alcoholic Beverage Act.

I want to renew my second motion, which was as to Count One, that the contract speaks for itself; that there is no opportunity for them to vary the terms of a written contract; that the contract does not contain any requirement, illegal requirement on our part, and they don't allege any breach of contract. They allege a breach of an illegal contract which they plead, the condition they say that was an implied condition, to wit, that we solicited and turned over to retailers sales of Calvert products which we made.

So I say to your Honor that I am going to renew the [104] motion on Count One, which states no claim for relief.

As to Count Three, I renew the motion that it

states no claim for relief because the provision of Section 11 merely says "if the distributor desires". And it was interesting to note, your Honor, when Counsel read the Warner Brothers case, the case on its face used the words "optionor or optionee".

We have no option, we have no right, we have no privilege—merely a desire. I have a desire to win this case, but that doesn't mean I have a right, privilege or option to win this case. That is all this language here says, if the distributor desires to renew he shall notify Calvert and Calvert can act.

With reference to the motion to strike, I want to make a motion to strike the interrogatories, those portions of the interrogatories which your Honor admitted subject to motion to strike.

I want to make a motion to strike the testimony of this witness, Mr. Lewis, because we are not here defending what we did or did not do. Assume what he said to be true and we didn't perform any phase of the promotional work, that is not what we are charged with breaching in the first count. We are charged with breaching the solicitation and failing to deliver what we solicited, the sales, to the wholesaler.

Now, this can't be a condition. I don't want to argue this question because Counsel's brief shows it is a provision [105] of a contract. It could either be a condition precedent, concurrent or subsequent, this so called illegal requirement on our part. However, whether it is a condition or not, under the code section the condition might be illegal.

So I say to your Honor that there is no possibil-

ity that any parole evidence can vary these provisions of the contract, which are clear and in plain English, and accordingly I suggest that the case must be dismissed for the reasons which I have indicated, and at all events Counts One and Two.

The Court: The Court is prepared to rule.

Mr. Hutchinson: Very well, your Honor.

The Court: Submit your motion and then we will proceed.

Mr. Ehrlich: I have no further evidence.

Mr. Hutchinson: That will be the case except for our showing of damages. Since that is a new subject would the Court suggest we take the afternoon recess now while I get our data and evidence?

Mr. Ehrlich: Couldn't we do this? Wouldn't your Honor be prepared to rule on liability? If I am correct in my contentions, this question of damages will take a number of days to go into, and wouldn't it be wise to get the ruling of the Court on liability before we go into that?

The Court: Very well. You have submitted your case, have you?

Mr. Hutchinson: Yes, with the exception of the damages. [106] I assume Counsel has in mind perhaps submitting a memorandum?

Mr. Ehrlich: No, I am prepared to submit it without memorandum.

Mr. Hutchinson: Well, we have prepared a trial memorandum and our other memorandum on the motion to strike. I had in mind if the Court thought it would be helpful to give some argument in support of our evidence.

The Court: Do you want to submit the case now?

Mr. Ehrlich: Yes. One thing I did forget, your Honor, to make a motion to dismiss pursuant to Rule 41-B. I should just for technical purposes.

I made these preliminary motions, but at this time, the plaintiff having completed the presentation of his evidence the defendant without waiving our right to offer evidence moves for dismissal on the ground that upon the facts and the law the plaintiff has shown no right for relief.

With that motion made, I submit our case.

Mr. Hutchinson: We submit it with the exception of the reserved issue of damages, your Honor, and offer any argument, oral or written.

The Court: I would like to have these motions that you have indicated typed and tomorrow morning I will dispose of the case.

Mr. Ehrlich: Thank you.

The Court: Unless I change my mind on the case as now [107] submitted, I am about to grant the motion. I don't want anybody to be taken by surprise. But I want a proper record here.

Mr. Ehrlich: I will have my four motions written out.

The Court: Alright, tomorrow morning at ten o'clock.

(Thereupon this cause was adjourned to Thursday, January 17, 1957, at the hour of ten o'clock a.m.) [108]

Morning Session

Thursday, January 17, 1957, 10:00 o'clock a.m.

The Clerk: J. C. Millett versus Distillers Distributing Corporation, for further trial.

Mr. Ehrlich: I handed your Honor the motions which your Honor requested.

Mr. Hutchinson: If your Honor please, before the motion is made, Plaintiff would like to move the Court for its order under Rule 15(B) permitting an amendment to conform to proof.

If I may deliver the proposed amendment to the Clerk, and perhaps it would be, in order to permit a ruling, well if I would read it to your Honor.

The proposal is to amend paragraphs seven, eight, nine and ten of the first cause of action, which the Court will recall had to do with the complaint of promotional activities of the defendant, the opposition alleged to carry out those activities on behalf of the plaintiff, and the testimony that the promotional support was withdrawn in 1952 about mid-year.

The proposed amendment to paragraph seven is as follows:

[Note: "Amendment to Complaint to Conform to Proof" is set out at pages 30-33 of this printed record.]

We move the Court to permit the amendment in accordance with the rule, and to conform to the testimony of Mr. Lewis, the answers of the defendant and interrogatories already adverted to, and offered and set out particularly in plaintiff's trial brief, which I can identify briefly as portions of

defendant's answers to interrogatories fourteen, fifteen, and nineteen.

It is also to conform to paragraph six of the contract, which has been admitted into evidence as plaintiff's Exhibit 1, and therefore does conform to proof.

We believe it will also eliminate a portion of the argument on the motions which are anticipated on defendant's part.

The Court is of course familiar with the liberality contemplated by rule 15(B) in conforming to proof. Such amendments may be made even after judgment. We think the motion is timely and will be particularly helpful in eliminating some side issues of the argument this morning.

Mr. Ehrlich: If the Court please, I have practiced law for forty years and this is a new experience—I think it is [113] forty one years or forty two years, and this is a new experience to me. After we try a case——

The Court: Don't allow that to exercise you. We have this experience every week.

Mr. Ehrlich: Well, this is a new one on me. I have found you may conform in some minor degree, but here trying to state some certain theories, the complaint was filed in August of 1954. I think it was August, 1954. The complaint is a sworn document. They plead these causes. We go ahead and prepare it, we accept it, we take interrogatories, based on the three counts contained in the complaint. They fail to make proof. I make my argument on illegality. They find they are in a legal box.

Now they come to your Honor after the case has been submitted, after all my motions have been made, and they want to change their theory of the case. We are unprepared to meet this kind of issue. The statute of limitations—he says in seeking his amendment, he says this, that we breached this contract on July 1, 1952. This is January 18th or 19th, 1957.

The first thought that occurs to me, now he wants to amend to state a cause of action that has been barred by the statute of limitations.

But I just point that out to your Honor in passing. I say to you there isn't the slightest basis for permitting this to be filed. This is an amendment to change the entire cause [114] of action.

The purpose is obvious, your Honor. Your Honor indicated a point of view, elaborate arguments were made, we analyzed the facts and the law, and finding that he is out because of his pleading and because of his failure to prove, he comes in here after the case is concluded saying, "I want to file a new cause of action."

I submit that the rule was never conceived to cover a situation of this kind.

Mr. Hutchinson: Insofar as the argument is concerned, your Honor, in the first place plaintiff from the very start claimed there had been a breach of the specific written contract and a failure to carry out promotional activities.

The Court: You didn't prove it.

Mr. Hutchinson: Promotional activities. The only one that Mr. Ehrlich is complaining about is

that our proof did not show that this man solicited orders unlawfully.

Now, as to the statute of limitations, paragraph C of Rule 15 provides:

“Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading the amendment dates back to the date of the original pleading,”

so we are not faced with any statute of limitations. [115]

The answer need not be amended because the denials run to the paragraphs and their special defenses are set up.

There is no necessity on their part to amend. This does conform to the proof. The contract does provide for promotion, the promotion described by the witness. It was carried out prior to the time when this meeting was had with Mr. Garfield and Mr. Taube, and thereafter it was dropped. Thereafter he never entered the place or gave support of any kind. That would be a failure of good faith to carry out the undertaking to promote.

We submit that the motion is valid in all respects and that it will advance justice.

The Court: Have you a copy?

Mr. Hutchinson: I have it here.

Mr. Ehrlich: I want to make a further point that your Honor suggested there has been no proof been admitted, and it has all been admitted subject

to my motion to strike. There is no proof of any kind.

I also call to your Honor's attention the fact that there is no proof we ceased promotional activities. All that Mr. Lewis, who was on the stand, testified to was that he didn't go into the Millett store. We have had no opportunity to make any showing of any kind, and he has made no showing which is necessary to rebut.

Mr. Hutchinson: The witness placed Mr. Fischer, the [116] other specialty man in the East Bay, in the conversation. He placed Mr. Garfield. He testified Mr. Fischer is still employed by the defendant at this time. Presumably Mr. Garfield is still alive and employed as originally.

Mr. Ehrlich: That isn't true. Why make a statement you don't know?

Mr. Hutchinson: I say presumably.

Mr. Ehrlich: Well, it isn't true.

Mr. Hutchinson: Being shown to exist, it is presumed it continues. If you want to show a change, you can do so.

The Court: I warn you gentlemen, I am liable to get nervous if you are not careful.

Mr. Hutchinson: Sorry, your Honor.

The Court: Now, I have in mind a form of judgment in this case if you want to dispose of this case on the motion.

Mr. Ehrlich: Yes, your Honor. We are prepared to stand, if your Honor please, on these various motions, and particularly the last motion which I have here, your Honor, in which we make

a motion, as we did yesterday, to dismiss the complaint and each cause of action thereof under the provisions of Rule 41(B), Federal Rules of Civil Procedure on the ground that under the facts and the law the plaintiff has shown no right to relief. We are prepared to stand on that.

The Court: The motions to amend these pleadings will [117] be denied.

Mr. Hutchinson: On the other motion, could we be heard briefly on that, your Honor? I understand Counsel is going to argue that now?

Mr. Ehrlich: No, I am not going to argue it. We submitted it yesterday.

Mr. Hutchinson: I would like to be heard briefly, your Honor, if I may.

The Court: All right, you may proceed. [118]

* * * * *

Mr. Hutchinson: Now, the right to renew is expressed in leases and contracts with which the Court is unquestionably familiar in many, many numbers in the business life in California.

The Court: If the theory in your case in that respect was true it would be a never ending contract.

Mr. Hutchinson: I would like particularly to call the Court's attention to the cases which hold what I have advised the Court I believe they did hold on that subject.

The Court: Give me you leading case and let's analyze it.

Mr. Hutchinson: Very well, your Honor. The principal case is Penilla versus Girsten, 86 Cal.

App. 668, 261 Pacific 488, which is quoted in a more recent case involving a distributorship contract and asserted breach thereof, your Honor, in 105 Cal. App. 2nd 103, here in the Supreme Court denied, and I am quoting the quotation in the latter case from the Penilla case.

The Court: It is well to recite what the facts are in those cases before we will be able to dispose of it.

Mr. Hutchinson: Yes. To take the most recent one, Ichen versus Pepsi Cola Bottling Company, 105 Cal. App. 2nd 113, this involved a number of distributors of a soft drink [124] Pepsi Cola, a brand name for a soft drink. These people had been dealing for a number of years. They originally had a contract which had a provision for renewal. It was exercised and the contract continued for another year. Subsequently other agreements were made without repeating the renewal provision.

The court held specifically that the original option to renew having been exercised, was finished and was not carried on into the future dealings three or four or five years later.

The Penilla case, which was quoted and relied upon in the Pepsi Cola case, involved a lease. This was a lease which provided for a renewal, and this is the statement of the rule:

“A general covenant to extend or renew implies an additional term with respect to the first, and upon the same terms except a covenant to renew to include which would make the least perpetual.”

The emphasis on “except a covenant to renew”

was supplied by the court in the Pepsi Cola case from which this is quoted.

The Supreme Court of the State of California very recently had occasion to consider another type of option in a lease, your Honor, in Spaulding versus Yoving-Young, 30 Cal. 2nd Reports, 138 to 142. There was not an option to renew but an option to purchase. It was in a lease on real property.

The lease also provided for an extension of the lease. [125] By simply holding over there was to be an extension of the lease, quote "upon the same terms and conditions." Several months after the extended period had commenced but after the term of the specific lease had ended, the lessee or assignee, I forget which, but at any rate the person claiming the right, entitled to the right of the lessee, attempted to exercise that option, and the court specifically held that it could only be exercised during the term of the original agreement and not during any extended period.

The Court: What was the term?

Mr. Hutchinson: As I recall, it was a two year term. [126] * * * * *

The Court: I will ask counsel on either side if they consulted the local rules, Rule 21, in relation to judgment and findings?

Mr. Hutchinson: I have consulted that but not with this immediate argument in mind, your Honor.

Mr. Ehrlich: I haven't read it, your Honor, but the thought occurred to me we did in the pretrial submit certain evidence.

The Court: I have in mind this record and a judgment on this record. With the energy your opponent has here, I am sure he is going across the hall, and I don't want to engage in an idle act here. That is all I am thinking about.

I think a proper record should be made here and I am not altogether satisfied with this record, disposing of it on the [134] motion itself. However, if that is your position, I will have to act.

Mr. Ehrlich: The thought occurred to me I would like to consider whether I should ask for a judgment in view of the fact that we did submit some evidence on our side in connection with the pretrial.

The Court: I denied the motion myself.

Mr. Ehrlich: Yes. Probably it would be preferable here for us to have a judgment and finding.

Mr. Hutchinson: If I read the rules of the Supreme Court correctly—I can't say for the moment which rule it is——

The Court: Our local rules is what I had in mind.

Mr. Hutchinson: I was going to say it might not make much difference if that rule is helpful at all to the Court. I believe it would require findings, even then, even in this situation; if the motion were granted it would require findings.

The Court: That is what I had in mind. I want to get up a proper record here and give both sides an equal opportunity.

Mr. Ehrlich: What I am concerned about now is the fact that we did introduce on our part these admissions from the interrogatories, and it might

be considered that we did put in evidence. Accordingly, I think we ought to comply with Rule 21 and have a judgment on the merits. [135]

The Court: If you are not satisfied with that, I will open up this case and give either side an opportunity.

Mr. Ehrlich: I am satisfied with our record. I have no further proof.

Mr. Hutchinson: If counsel wishes, we would stipulate he could withdraw his offer on pretrial of the evidence, if you want to submit it on the motion.

Mr. Ehrlich: No, I don't want to at this time.

The Court: I never went so far as to tell anybody what they should do. I do the best I can with the material presented.

Mr. Hutchinson: I am sure we all like to have the Court's comments on the case set out in as clear a way as possible.

Mr. Ehrlich: I think I would submit it on the merits, your Honor, in preference to the motions. Because I did introduce some testimony, I prefer to submit it on the merits.

Mr. Hutchinson: May we have a stipulation, your Honor, notwithstanding that the question of damages has been deferred, may I request whether counsel is willing to stipulate the question of actual injury and the amount and fact of damages is not an issue that has been submitted and that nothing is suffered by the plaintiff by reason of not having that?

The Court: Are you prepared to go on with damages this morning?

Mr. Hutchinson: Yes, your Honor. [136]

The Court: Is the defendant prepared to go on? If you want further time, I will give it to you. Call your witness.

Mr. Ehrlich: Wouldn't it be preferable, your Honor, to reserve the rights on damages than to go through this? This will go for some time because we intend to have expert witnesses and go into the books and records, and it seems to me an idle act at this time if we could make a proper stipulation so that in the event counsel decides to——

The Court: (Interposing.) I think that would be the best thing to do.

Mr. Hutchinson: I suggested that, your Honor, in view of what had gone forward this morning and yesterday. In other words, we don't want to be in a situation here where it will be said, "You didn't offer any proof that you are damaged." We don't want to be in that position.

Mr. Ehrlich: Couldn't we work out a stipulation? I want to be careful. This isn't a stipulation. I am just suggesting it.

The Court: I will take a recess so that you may get together.

(Short recess.)

Mr. Ehrlich: If your Honor please, we have arrived at a stipulation which reads as follows: That plaintiff is ready and willing to offer proof of loss and damage relating [137] to the First Cause, Second Cause and Third Cause of Action, but defers such offer of proof without prejudice to

either party, by stipulation of counsel in open court, pending the Court's determination of liability.

Mr. Hutchinson: That is acceptable to us, your Honor.

The Court: Very well.

Now, I will offer another suggestion so that both sides will at least have a full opportunity. If either side wants to present any testimony in relation to what the record already discloses, they may do so. If not, why, submit your case.

Mr. Ehrlich: Submitted, your Honor.

The Court: Prepare the judgment in accordance with the rules I just called your attention to—judgment and findings.

Mr. Ehrlich: For the defendant, your Honor.

The Court: Yes. And when will you be here? Shall we let it go over five days?

Mr. Ehrlich: We will have it done in the next couple of days.

The Court: Serve a copy on opposing counsel.

Mr. Ehrlich: Yes, your Honor.

The Court: It may go over on the calendar, to give you an opportunity, until the 24th. Is that agreeable?

(Discussion between court and counsel off the record.)

The Court: Is the 25th agreeable? All right, January 25th.

(Thereupon this cause was adjourned to Friday, January 25, 1957, at the hour of 10:00 o'clock A.M.) [138]

Friday, January 25, 1957, 10:00 o'clock a.m.

The Clerk: Millett vs. Distillers Distributing Company, settlement of findings, entry of judgment.

Mr. Ehrlich: We have presented findings, if your Honor please.

The Court: Is that on the calendar this morning?

Mr. Ehrlich: Yes, your Honor. We have presented our findings. I have been served with objections. My only statement is that the matter has been thoroughly argued to your Honor on a number of occasions and I am prepared to submit them, and I am satisfied that our findings correctly express the conclusions of the Court.

Mr. Hutchinson: If the Court please, we have filed objections so that on submission the Court will have our objections spelled out rather fully. We have, as counsel has indicated, argued this matter to the Court in connection with motions, and I do not think it would be appropriate to repeat our arguments here and now. We do, however, ask the Court to recall our arguments and the authorities we cited, in reviewing these findings, and that each of our objections be considered in the light of the authorities and the argument we have already submitted to the Court, particularly including our trial brief and the memorandum on the motion to dismiss, as well as the oral argument in open court during the trial. [139]

There are two points which I would like, however, to briefly comment upon, your Honor, and particularly urge that if the Court determines that these proposed findings and conclusions of the judgment

are otherwise acceptable and they conform to the Court's views of the matter, these two, at least, should be reviewed. The first is paragraph 12 of the proposed findings appearing on page 3, lines 23——

The Court: Paragraph 12 what?

Mr. Hutchinson: Twelve of the proposed findings, appearing on page 3, line 23 through 26. So we will have that language before us I will read it. That reads as follows:

"That it is not true that plaintiff has been damaged in the sums alleged in plaintiff's Complaint, or in any other sum by reason of any acts or conduct on the part of the Calverts Distillers Corporation or its agents, servants or employees."

The Court will recall that by stipulation damages were reserved.

The Court: Yes.

Mr. Hutchinson: So that it would be improper to find there were no damages. Moreover, it was the sense of the Court's ruling, as we understood it, that it was not that the plaintiff was not damaged; as a matter of fact, there is a presumption that the plaintiff was damaged by losing the order submitted, by losing the claim, and by losing the year's [140] opportunity to sell Calvert and Carstairs products. In other words, it was the Court's view, as we got it, that there was no liability.

The Court: You reserved in the stipulation the amount of damages, but I concluded he was not entitled to any damages.

Mr. Hutchinson: The Court ruled on the ques-

tion of liability, and it would be improper for the Court to find that there were no damages. I think the Court should strike that.

The Court: How would you make a finding?

Mr. Hutchinson: I think there should be no finding on damages at all. If the Court finds there is no liability, it is impossible to consider damages.

The Court: Well, I am going to sign that.

Mr. Hutchinson: Finding that there is no damage?

The Court: Yes, that is what I found.

Mr. Hutchinson: I thought you found there was no liability, your Honor.

The Court: We are juggling words.

Mr. Hutchinson: We consider that a matter of importance in the case, your Honor.

The Court: However, I will think it over.

Mr. Hutchinson: The other one is in the purported conclusions, No. 4, appearing on page 4 of the proposed findings and conclusions, lines 13 through 15. It is very [141] brief. I will read it.

“The contract pleaded in plaintiff’s Complaint and relied upon by plaintiff in this action was and is illegal, null and void.”

First in that connection, we would like at this time to renew, without going into detail, our motion for leave to amend to conform to the proof.

The Court: We have a record on that.

Mr. Hutchinson: Yes.

The Court: I denied your motion.

Mr. Hutchinson: I am merely remaking it, your Honor, as the Court itself suggested, to see that our

record is as complete as we can make it. On that point it is our submission that the paragraph in the conclusions should be stricken, because there is no issue and no proof, and in that connection may I call the Court's attention to Patapar Corporation vs. Paramount Pictures Corporation, 347 U.S. 89, 98 Law Edition (I do not have the pages). I am looking at an advance sheet citation. In the advance sheet it is page 301. That case arose in California in the District Court and reached the Supreme Court. The factual background, insofar as our point is concerned, was rather briefly this, your Honor: Paramount had joined a conspiracy or combine to enforce restrictions on theatres and use of films and theatres, a matter which has engaged the Federal Courts at some length. The United States [142] sought an injunction in a civil action under the Sherman Act, Sections 1 and 2, I believe, on the ground, among others, that the contract, namely, a franchise for the selling of pictures and a lease, were in restraint of trade; secondly, there was an underlying conspiracy whence these documents arose, and for which purpose they were made and carried out. The trial court in that case found on both grounds, namely, that the contracts were invalid; secondly, that they were a part of a conspiracy and used as a means of carrying it out. The United States in that case, the Government case, was affirmed on the conspiracy but reversed as to the finding that these franchises and the leases were invalid on their face per se, as the defendant here apparently argues. The civil action com-

menced when Paramount sought to take advantage of its own wrong, as does the defendant here, and brought an action in unlawful detainer, or at least for the purpose of securing possession of the premises on the theory that the lease was invalid as in restraint of trade. The trial court properly held where there was no evidence of conspiracy, the contracts were not invalid on their face and denied all relief to the lessee, who was seeking by counter-claim treble damages under the United States anti-trust laws. The court very pointedly makes it clear that since the contract is not invalid on its face, and there was no evidence of conspiracy in the immediate case, even though there was proof to a degree in the Government [143] case, there could be no finding of invalidity or illegality, and that the dismissal without trial of the counter-claims and the ignoring of the issue as stated by the answer was proper. That the United States Supreme Court affirmed, notwithstanding that the counter-claims had been severed, and set for trial. They said that the trial and answer were sufficient. We particularly urge that those two provisions be stricken, your Honor, if the Court otherwise overrules our other objections.

The Court: Does the matter stand submitted?

Mr. Ehrlich: Yes, your Honor.

Mr. Hutchinson: Yes, your Honor.

The Court: Very well. The matter stands submitted.

[Endorsed]: Filed March 5, 1957. [144]

[Endorsed]: No. 15480. United States Court of Appeals for the Ninth Circuit. J. C. Millett Co., a corporation doing business as Key Distributing Co., Appellant, vs. Distillers Distributing Corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed: March 11, 1957.

Docketed: March 19, 1957.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In The United States Court of Appeals
For The Ninth Circuit

No. 15480

J. C. MILLETT COMPANY, a corporation, doing
business as KEY DISTRIBUTING COM-
PANY, Appellant,

vs.

DISTILLERS DISTRIBUTING CORPORA-
TION, et al., Appellee.

APPELLEE'S DESIGNATION OF ADDI-
TIONAL PARTS OF THE RECORD
DEEMED MATERIAL

Pursuant to Rule 17(6) of this Court, appellee hereby designates the following parts of the record

deemed material, all of which are in addition to those heretofore designated by appellant:

1. Findings of fact and conclusions of law;
2. Interrogatories propounded by appellant to appellee numbered 21(a), (b);
3. Answer of appellee to appellant's interrogatory numbered 21(a), (b) as quoted in the reporter's transcript on appeal, page 62, line 23, through page 63, line 14;
4. Interrogatory propounded by appellee to appellant numbered 4;
5. Answer of appellant to appellee's interrogatory numbered 4 as quoted in reporter's transcript on appeal, page 57, lines 8 through 26;
6. Reporter's transcript of oral proceedings as follows:
 - (a) Page 11, line 10, through page 23, line 15;
 - (b) Page 24, line 14, through page 33, line 22.

Dated: March 27, 1957.

PHILIP S. EHRLICH,
IRVING ROVENS,
Attorneys for Appellee.

Certificate of Service Attached.

[Endorsed]: Filed March 28, 1957. Paul P. O'Brien, Clerk.

